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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1281

MEL TONASKET, et al.,
Petitioners,
v.
ALICE M. THOMPSON,
Respondent.

NARCISSE NICHOLSON, JR., et al.,
Petitioners,
v.
JUNE KAREN LABAMIE, et al.,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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February 20, 1974

SHEPPARD & MAY PRESS, INC. SEATTLE, WASHINGTON

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

These cases involve the question whether the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-3, waives all sovereign immunity of Indian Tribes from suit in federal courts and vests federal courts with jurisdiction to determine questions of tribal membership.

The 9th Circuit Court of Appeals has interpreted 25 U.S.C. §§1301-3 in such broad fashion as to annihilate the long-standing sovereign immunity of Indian tribes from suit in federal courts, destroy the internal sovereign right of Indian tribes to determine their own membership—a right carefully established and protected by decisions of

the Supreme Court—and finally, subject Indian tribes to suits for damages and attorneys fees.

Because of the very substantial threat to continued existence of all Indian tribal governments implicit in the rulings, the Colville Confederated Tribes petition for writs of certiorari to review the judgments of the 9th Circuit Court of Appeals.

OPINIONS BELOW

The opinions of the 9th Circuit Court of Appeals are reported as *Thompson v. Tonasket*, 487 F.2d 316 (1973), and *Laramie v. Nicholson*, 487 F.2d 315 (1973), and are reproduced as Appendix A to this Petition.

JURISDICTION

The Judgments of the 9th Circuit Court of Appeals were entered on November 2, 1973, in the *Thompson* case, and on October 9, 1973, in the *Laramie* case. On December 11, 1973, Mr. Justice Douglas granted an extension for the time within which to file a petition for writ of ceriorari in each case until February 20, 1974 (*Thompson*, A-568; *Laramie*, A-574).

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-3 waive all sovereign immunity of Indian tribes to suit in federal courts?

2. Does the Act vest the federal courts with jurisdiction to determine questions of tribal membership?

3. Does the Act vest the federal courts with jurisdiction to award judgments against Indian tribes in civil rights actions for damages and attorneys fees?

4. Does the Act vest the federal courts with jurisdiction to satisfy such judgments against Indian tribes out of tribal assets, including trust and restricted assets?

5. Is the Act retroactive?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Article I, section 8, clause 2 (the Indian commerce clause).[1]

The Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-3.[2]

Article VII of the Constitution and By-Laws of the Confederated Tribes of the Colville Indian Reservation, Washington.[3]

Resolution 1967-186 of the Colville Business Council.[4]

Resolution 1969-349 of the Colville Business Council.[5]

STATEMENT OF THE CASE

While presenting the same legal questions, *Thompson* and *Laramie* involve factual settings which must be separately summarized:

1. App. B, p. A-4.
2. App. B, p. A-4.
3. App. B, p. A-6.
4. App. B, p. A-7.
5. App. B, p. A-9.

1. Thompson Factual Setting

Alice M. Thompson was born in Oroville, Washington, in 1911, and was listed as Enrollee No. 3255 on the Colville Tribal Census Roll dated January 1, 1950. In approximately 1937, Mrs. Thompson moved to Oliver, British Columbia, Canada, where she resided for approximately 20 years prior to her disenrollment hearing.

In 1953, Mrs. Thompson registered as voter No. 1915 in Polling Division No. 12, Oliver, British Columbia, Canada, of the Similkameen Electoral District (R. 40). A prerequisite to registration and voting in Canada is British or Canadian citizenship (R. 34). To register for inclusion in the Provincial Voters' List in British Columbia, an applicant must certify as follows:

> I hereby certify that the information given below is correct and that I am in no respect disqualified from being registered as a voter. (R. 44)

Thus, in registering, Mrs. Thompson affirmed under oath that she was a Canadian citizen.

On June 9, 1953, Mrs. Thompson voted in a Provincial election in Oliver, British Columbia, Canada.

On January 4, 1957, a letter was sent to Mrs. Thompson, advising her that the Colville Enrollment Committee would hold a hearing on January 25, 1957, at 10 a.m. at the Colville Indian Agency, Nespelem, Washington, for the purpose of hearing evidence and making a recommendation to the Colville Business Council concerning her disenrollment (R. 32). The notice advised Mrs. Thompson that the basis for considering her disenrollment was that she had:

a. Taken up permanent residence in Canada, or

b. Had voluntarily abandoned her membership in the Confederated Tribes of the Colville Reservation, or had done one or more of said acts.

and that she

> . . . might appear at said meeting, introduce evidence, examine or cross-examine witnesses, and be represented by counsel. (R. 43)

Mrs. Thompson received the notice on January 5, 1957, and attended the hearing on January 25, 1957 (R. 32). As the record of the hearing indicates, Mrs. Thompson neither requested representation before the Enrollment Committee by an attorney nor objected to the absence of an attorney to represent her.

At the disenrollment hearing of January 25, 1957, Mrs. Thompson admitted her 20-year residence in Canada (R. 36), admitted her Canadian citizenship (R. 34), and admitted voting in the Provincial election on June 9, 1953 (R. 37). She again admitted having voted in the Provincial election by sworn affidavit (R. 50).

On June 27th the Colville Business Council, upon recommendation of the Enrollment Committee, enacted Resolution 1957-113 (R. 43) which disenrolled Mrs. Thompson and recited the Findings of Fact and the basis upon which Mrs. Thompson was disenrolled. Significant Findings of Fact in Resolution 1957-113 are in part:

> 5. Additional facts in evidence: . . .
>
> . . .
>
> Mrs. Alice Haynes Thompson is the daughter of Valentine C. Haynes, a non-Indian who is a Canadian national and citizen.
>
> . . .
>
> Mrs. Alice Haynes Thompson has resided continu-

> ously near Oliver, British Columbia, Canada, for the past twenty years, . . .
>
> By exercising her right of franchise in the Province of British Columbia, Canada, Mrs. Alice Haynes Thompson put herself in a status of an alien Indian.

The Resolution then concluded:

> b. Conclusions:
>
> 1. That we, the Colville Business Council of the Confederated Tribes of the Colville Reservation, therefore determine that Alice Haynes Thompson was, on the 21st day of March, 1952 an alien Indian and within the purview of Section 2 of Amendment III of the Constitution of the Confederated Tribes of the Colville Reservation, and did thereby on said date cease to be a member of the Confederated Tribes of the Colville Reservation.

On February 10, 1970, Mrs. Thompson filed an application for adoption. At the time adoptions were governed in part by Resolution 1969-349 of the Colville Business Council, approved by the Commissioner of Indian Affairs on November 24, 1969, which provided in part:

> Section 5. Applicants must possess good character and otherwise be acceptable to the Business Council as a tribal member.

Mrs. Thompson was not "otherwise acceptable" to the Colville Business Council which denied her application without the need for a formal hearing on April 26, 1971. She then brought this action on August 23, 1971. The complaint is reproduced in Appendix C to this petition and analyzed in detail in section 7(a) below.

Petitioners moved to dismiss the complaint[6] on the ground that the federal court lacked jurisdiction over the

6. App. C, p. A-11.

Colville Confederated Tribes, et al., and the subject matter, and on the ground that the complaint failed to state a claim upon which relief could be granted. The motions were heard before the Honorable William N. Goodwin, and on November 30, 1971, the court dismissed the complaint for lack of subject matter jurisdiction. On December 17, 1971, Mrs. Thompson filed a Notice of Appeal to the 9th Circuit Court of Appeals and on November 2, 1973, the 9th Circuit Court of Appeals entered judgment reversing the dismissal and remanding the case to the district court for further proceedings.

2. Laramie Factual Setting

The dates and places of birth of the three Laramie children are as follows:

Name	Date of Birth	Place of Birth
June Karen Laramie	Sept. 11, 1954	Tonasket, Wash.
Patricia May Laramie	May 23, 1956	Oliver, B.C., Can.
Connie Sue Laramie	Jan. 7, 1958	Oliver, B.C., Can.

Prior to April 18, 1963, the Laramie children, and their mother, Evelyn A. Laramie, were enrolled members of the Penticton Band of Okanogan Indians of British Columbia, Canada. On April 18, 1963, Mrs. Laramie and the three children were declared enfranchised; that is, under Canadian law, disenrolled from the Penticton Band of Okanogan Indians and made ordinary Canadian citizens (R. 68).

Sometime after April 18, 1963, Mrs. Laramie first approached the Colville Business Council with an oral request that the Laramie children be adopted by the Colville Confederated Tribes. She discussed the matter with Edward Palmanteer, who was then the Tribal Enrollment Officer and who contacted Mr. N. E. Whitehead, Officer

in Charge of the Okanogan Indian Agency in Vernon, British Columbia, to discuss the matter. Mr. Whitehead verified the disenrollment and enfranchisement of the Laramie children (R. 68).

The applications for adoption of the Laramie children were never acted upon by the Colville Business Council, since the Tribes closed all adoptions on June 20, 1961, pursuant to Resolution 1961-160 which was approved by the Commissioner of Indian Affairs on July 26, 1961 (R. 73). Adoptions were only recommenced by the Colville Confederated Tribes on December 16, 1966, under Resolution 1966-393 (R. 74).

By January 22, 1968, all prior applications for adoption of any of the Laramie children were abandoned, and on that day the first written applications for adoption of the Laramie children were filed with the Colville Business Council just 11 days after Mrs. Laramie herself was adopted by the Colville Confederated Tribes (R. 65-67).

On November 14, 1968, the Enrollment Committee recommended to the Colville Business Council that the applications for adoption of the Laramie children be denied, since at that time each was a Canadian citizen and each had been an enrolled member of the Penticton Band of Okanogan Indians in Canada. The committee recommendations were approved by the Colville Business Council and on November 22, 1968, without the need for a formal hearing, applications for adoption of the Laramie children were denied (R. 69-71).

Section 2(c) of Article VII of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation provides that alien Indians and those enrolled with

foreign tribes of Indians shall lose their membership in the Colville Confederated Tribes. Since the effective date of that provision, April 14, 1950, the consistent policy of the Colville Confederated Tribes has been not to adopt any person who at the time of his application for adoption *was or had previously been* an enrolled member of a tribe of foreign Indians (R. 63). That policy was codified in Resolution 1967-186, enacted July 2, 1967, and approved by the Commissioner of Indian Affairs on August 2, 1967 (R. 76). Resolution 1967-186 reads in part:

> Section 4—If the applicant is already a duly enrolled member of another recognized tribe, this will deem the applicant automatically ineligible for adoption in the Colville Confederated Tribes, regardless of whether the applicant offers to relinquish his or her rights with the other tribe.
>
> Section 5—Applicants must possess good character and otherwise be acceptable to the Business Council as a tribal member . . .

On September 22, 1969, Resolution 1969-349 (R. 77) was adopted to clarify a misunderstanding concerning the wording of §4 of Resolution 1967-186, but it did not alter the previously adopted policy and it re-enacted §5. Section 4 of Resolution 1969-349 reads:

> Section 4—If the applicant is already a duly enrolled member, or has in the past been a duly enrolled member of another recognized Indian tribe, this will deem the applicant ineligible for adoption in the Colville Confederated Tribes, regardless of whether the applicant offers to relinquish, or has relinquished, his or her rights with the other tribe.

The eligibility for adoption by the Colville Confederated Tribes of the Laramie children was considered upon the basis of the rules and regulations governing adoption of

persons into tribal membership in effect on November 22, 1968. Because the Laramie children had previously been duly enrolled members of the Penticton Band of Okanogan Indians, were Canadian citizens on November 22, 1968, and not "otherwise acceptable" to the Colville Business Council, they were denied adoption into the Colville Confederated Tribes. The Laramie children then brought this action on July 22, 1970. The complaint is reproduced in Appendix C to this petition and is analyzed in detail in section 7(b) below. Petitioners moved to dismiss the complaint[7] on the ground that the federal court lacked jurisdiction over the Colville Confederated Tribes, et al., and the subject matter, and on the ground that the complaint failed to state a claim upon which relief could be granted. The motions were heard before the Honorable Charles L. Powell and on January 18, 1972, the court dismissed the complaint for lack of subject matter jurisdiction. On January 24, 1972, plaintiffs Laramie filed a Notice of Appeal to the 9th Circuit Court of Appeals and on October 9, 1973, the 9th Circuit Court of Appeals entered judgment reversing the dismissal and remanding the case to the district court for further proceedings.

REASONS FOR GRANTING THE WRITS

1. Plaintiffs Thompson and Laramie Were Required to Establish Jurisdiction of the Federal Courts Over the Colville Confederated Tribes, et al., and The Subject Matter of This Action

In order to enable the federal courts to grant them relief, plaintiffs Thompson and Laramie were required to aver and prove the grounds of jurisdiction of the federal courts both over the Colville Confederated Tribes and the subject

7. App. C, p. A-18.

matter of this action. As held in *Bowman v. White*, 388 F.2d 756 (4th Cir. 1968):

> The federal courts are courts of limited jurisdiction and are empowered to act only in those specific instances authorized by Congress. The burden is on the party asserting jurisdiction of the court to show that jurisdiction does, in fact, exist. *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178, 56 S. Ct. 780, 80 L. Ed. 1135 (1935). Furthermore, the complaint must state on its face the grounds for its jurisdiction. *Gold Washington & Water Co. v. Keyes*, 96 U.S. 199, 24 L. Ed. 656 (1887). These rules are applicable to diversity as well as to the "federal question" jurisdiction of the district courts. Federal Rules of Civil Procedure, §8(a).

388 F.2d at 760. This principle is upheld in *Irvey v. Frost*, 346 F.2d 115 (8th Cir. 1965) at page 115:

> Plaintiff has made no adequate statement of jurisdictional facts. Upon this ground alone, the complaint is fatally defective.

Cases which support this oft-cited principle include *Brown Bros. Equipment Co. v. State of Michigan*, 266 F. Supp. 506 (W.D. Michigan 1967); *LeMieux Bros. v. Tremont Lumber Co.*, 140 F.2d 387 (5th Cir. 1944); *Stewart v. United States*, 199 F.2d 517 (7th Cir. 1952); and *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F. Supp. 594 (S.D. California 1956); *affirmed*, 245 F.2d 874 (9th Cir. 1957), *cert. denied*, 355 U.S. 927, 78 S. Ct. 384, 2 L. Ed. 357 (1958).

Plaintiffs Thompson and Laramie did not aver or prove any specific ground of federal jurisdiction over the Colville Confederated Tribes, et al., such as diversity jurisdiction under 28 U.S.C. §1332. Instead, they grounded these two

actions on the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-3. Therefore, that Act must be analyzed against the backdrop of sovereign immunity of Indian tribes from suit in federal courts to determine whether the averments of the complaints are sufficient to support the jurisdiction of the federal courts to hear these actions and grant plaintiffs relief.

2. The Colville Confederated Tribes Are Immune From Suit in Federal Courts Without Express Congressional Authorization

These cases must be approached from the premise that as Indian tribes recognized by the federal government, the Colville Confederated Tribes are exempt from direct suit in federal courts without express Congressional authorization. *United States v. United States Fidelity Co.*, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894 (1940); *Twin Cities Chippewa Tribal Council v. The Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 213 F.2d 89 (8th Cir. 1956).

Sovereign immunity of Indian tribes from suit in federal courts is not lightly to be considered abrogated. In *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895), the 8th Circuit Court of Appeals held that statutory authority necessary to subject a tribe to jurisdiction of the federal courts must be "expressed in plain and unambiguous terms." Similarly, the 10th Circuit Court of Appeals recently held in *Native American Church, etc. v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), that jurisdiction of an Indian tribe in federal court does not exist "unless jurisdiction is *expressly* conferred by Congressional enactment." (Emphasis supplied.) 272 F.2d at 133.

3. Determination of Tribal Membership is an Internal Sovereign Right of the Colville Confederated Tribes, Subject Only to the Plenary Control of Congress, and Not to Control By The Federal Courts

Perhaps the most basic and fundamental sovereign right of an Indian tribe is its complete authority to determine all questions of its own membership as a political entity. *Roff v. Burney*, 168 U.S. 218, 18 S. Ct. 60, 42 L. Ed. 422 (1897); *Martinez v. Southern Ute Tribe of the Southern Ute Reservation*, 249 F.2d 915 (10th Cir. 1957).

The source of an Indian tribe's right to determine membership questions is discussed at length in 55 I.D. 14 (1934):

> The power of an Indian tribe to determine questions of its own membership arises necessarily from the character of an Indian tribe as a distinct political entity.

55 I.D. 14 at 33. As to the scope of a tribe's power, the author notes:

> The courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership. It may thus *by usage* or *written law* determine under what conditions persons of mixed blood shall be considered members of the tribe. It may provide for special formalities or recognition, and it may adopt *such rules as seem suitable to it, to regulate the abandonment of membership, the adoption of* non-Indians or *Indians or other tribes*, and the types of membership or citizenship which it may choose to recognize for tribal purposes. . . .

(Emphasis supplied). 55 I.D. 14 at 33.

That the power of an Indian tribe to determine with complete authority all questions of its own membership

includes the power to revoke rights of membership which it has granted is recognized by the Supreme Court. *Roff v. Burney, supra.*

Federal courts have never been granted express jurisdiction by Congress to consider tribal membership questions. Accordingly, the Supreme Court held in *Lone Wolf v. Hitchcock,* 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903):

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, *not subject to be controlled by the judicial department of the government.*

(Emphasis supplied). 187 U.S. at 565.

4. Congress Has Strengthened, Not Diminished, the Right of the Colville Confederated Tribes to Determine Questions of Tribal Membership

In contrast to the federal courts, Congress has plenary power to regulate questions of tribal membership. *Lone Wolf v. Hitchcock, supra.* As stated in 55 I.D. 14 (1934):

> The power of the Indian tribes in this field is limited only by the various statutes of Congress defining the membership of certain tribes for purposes of allotment or for other purposes, and by the statutory authority given to the Secretary of the Interior to promulgate a final tribal roll for the purpose of dividing and distributing the tribal funds.

55 I.D. 14 at 33.

Congress has exercised its plenary authority in this area in a variety of ways. In 25 U.S.C. §163 Congress delegated to the Secretary of the Interior general authority to approve final tribal rolls for purposes of dividing and distributing tribal funds. Congress has enacted other enroll-

ment statutes limited to specific tribes and regulating membership for allotment and other purposes.[8] Finally, Congress has occasionally provided for additions to or corrections of tribal rolls in individual cases.[9]

With regard to the Colville Confederated Tribes, Congress' method has been to sanction but supervise tribal enrollment practices. In addition to the general statute, 25 U.S.C. §163, enacted in 1919, Congress enacted 25 U.S.C. §1071 in 1964 to govern per capita payments. 25 U.S.C. §1071 specifically limits per capita payments "to each enrolled member of the Colville Confederated Tribes of the Colville Reservation."

But how is a tribal roll to be ascertained? The answer lies in delegation of authority to the Secretary through 25 U.S.C. §163 and §1071, redelegation to the Commissioner through 25 U.S.C. §2, and further redelegation all the way to the Superintendent of the Colville Indian Agency.[10] *Accordingly, each per capita and dividend payment is made with the sanction of federal approval of the tribal membership roll.*

But delegation by Congress to the Secretary and redelegation finally to the Superintendent of the Colville Indian

8. Act of March 3, 1881, sec. 4, 21 Stat. 414, 433 (Miami); Act of March 2, 1889, 25 Stat. 1013 (United Peorias and Miami); Act of February 13, 1891, 26 Stat. 749, 753 (Sac and Fox and Others).

9. Act of May 30, 1896, 29 Stat. 736 (a Sac and Fox woman); Joint Resolution of October 20, 1914, 38 Stat. 780 (Five Civilized Tribes); Act of May 31, 1924, Chapter 215, 43 Stat. 246 (Flathead).

10. Secretarial Order No. 2508(13) (t), 16 F.R. 11974. (Redelegation authority given to the Commissioner); Bureau Order 551, §379(b) 33 F.R. 12974 (Redelegation authority given to the Portland Area Director); Portland Area Office Redelegation Order 3, 34 F.R. 15815 (Final delegation of authority to the Superintendent of the Colville Indian Agency).

Agency of final authority over tribal rolls does not require that the rolls be prepared by the Department or the Bureau of Indian Affairs. Rather, as stated in Felix S. Cohen, FEDERAL INDIAN LAW (1966 Printing by Association of American Indian Affairs, Inc., N.Y.):

> Whatever may be the exact extent of departmental power in this field, in view of the broad provisions of the Wheeler-Howard Act, it has been administratively held that the *Secretary of the Interior may define and confine his power of supervision* in accordance with the terms of a constitution adopted by the tribe itself and approved by him.

(Emphasis supplied). FEDERAL INDIAN LAW at 421.

And even the broad general power of the Secretary over tribal rolls is not without limitation. As stated by the Solicitor of the Department of the Interior in an Opinion dated December 18, 1937:

> . . . while the Department may approve or disapprove adoptions into the tribe and expulsion therefrom made by the tribal authorities, no case holds that the Department, in the absence of express statutory authorization, may grant a person tribal membership over the protest of the tribal authorities.

In keeping with his rightful authority to "define and confine" his power of supervision of Indian tribal rolls through the terms of tribal constitutions, the Secretary has approved Article VII of the Constitution and By-Laws of the Colville Confederated Tribes.[11]

In Article VII the Colville Business Council is given power to prescribe rules and regulations governing future

11. App. B, p. A-6. Article VII was adopted as Amendment III, approved by the Secretary on April 14, 1950, and added to by Amendment V, approved by the Secretary on July 2, 1959.

membership in the tribes, *including the adoption of members and loss of membership, subject to approval of the Secretary of the Interior.* Futher, pursuant to his supervisory powers over such regulations, the Secretary has approved Resolution 1967-186[12] and Resolution 1969-349,[13] which specifically govern adoptions and which disqualify (1) applicants for adoption who are or have in the past been enrolled in other tribes, and (2) applicants who are not of good character or who are not otherwise acceptable to the Colville Business Council.

Thus, the Secretary has confined his supervisory power to approval of tribal membership rules and regulations, and has not only not interfered with but has positively strengthened the sole sovereign right of the Colville Business Council to regulate membership *in its absolute discretion* with the single limitation that the Tribes may not deprive anyone of vested property rights, such as allotments or inherited interests.

It becomes obvious to the reader that the governmental function of an Indian tribe in adopting members is analogous to the naturalization of citizens by the United States. Indeed, the Supreme Court has referred to tribal enrollment as "Indian naturalization." *Cherokee Intermarriage Cases*, 203 U.S. 76, 27 S. Ct. 29, 51 L. Ed. 96 (1906). That description is peculiarly apt since the absolute discretion of an Indian tribe to determine the conditions for enrollment is as broad as that of the United States to determine the conditions for naturalization. An alien has no

12. App. B, p. A-6.
13. App. B, p. A-9.

inherent right to naturalization and Congress may refuse or may grant naturalization upon any conditions it may prescribe. As stated by the Supreme Court in the *United States v. Ginsberg*, 243 U.S. 472, 37 S. Ct. 422, 61 L. Ed. 853 (1917):

> No alien has the slightest right to naturalization unless all statutory requirements are complied with. . . .

243 U.S. at 475.

5. The Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-3, Does Not Waive the Sovereign Immunity of the Colville Confederated Tribes From Suit in Federal Courts

As demonstrated, Congress has never *expressly* waived sovereign immunity of Indian tribes from suit in federal courts by conferring jurisdiction upon the courts to determine tribal membership questions. But plaintiffs Thompson and Laramie proceed under 25 U.S.C. §1302 as *implicitly* waiving sovereign immunity and vesting the federal courts with subject matter jurisdiction. And the 9th Circuit Court of Appeals has upheld their contention through the device of seizing upon 28 U.S.C. §1343(4) to provide the necessary jurisdictional basis. In doing so the 9th Circuit Court of Appeals has decided an extremely important question of federal law which has not been, but should be, settled by the Supreme Court, and has decided it in a way which conflicts with *United States v. United States Fidelity Co.*, *Roff v. Burney*, and *Lone Wolf v. Hitchcock, supra*, and other applicable decisions of the Supreme Court.

The analysis of the 9th Circuit Court of Appeals reveals

that in approaching these cases it has violated the admonition of Supreme Court in *McClanahan v. Arizona State Tax Commission,* ..... U.S. ...., 93 S. Ct. 1257, 1262, 36 L. Ed. 2d 129, 136 (1973) that "federal statutes must be read" against a backdrop of the doctrine of tribal sovereignty. Had the 9th Circuit Court of Appeals followed the clear guidance of the Supreme Court, it would have discovered from 25 U.S.C. §§1301-3 and its history no indication that Congress intended to waive sovereign immunity of Indian tribes from suit in federal courts, but, quite the opposite, that Congress affirmatively intended not to waive tribal sovereign immunity.

In order to meet the challenge of protecting civil rights of members of Indian tribes, Congress rejected the approach of focusing upon the federal court system and chose instead to strengthen tribal governments and tribal institutions. Since testimony before the Ervin Committee indicated that constitutions of many Indian tribes lacked civil rights protections, Congress found it necessary to enunciate a list of civil rights guarantees for the first time *as a matter of federal law.* 25 U.S.C. §1302 stands as a guide to Indian tribes in exercising their governmental powers, a guide to the Secretary of the Interior in exercising his supervisory powers, and, lastly, a guide to the federal courts in habeas corpus proceedings resulting from tribal detentions.

The manner in which the Indian Civil Rights Act of 1968 was designed to function is as follows:

(a) *The Act Strengthens Tribal Governments*

A major portion of the Act is found in 25 U.S.C. §§1321-2 which amend Public Law 83-280. Because testimony before the Ervin Committee indicated the failure of state Indian jurisdiction, Congress granted Indian tribes the right of consent to any further state jurisdiction. The sections were bolstered by 25 U.S.C. §1323 which provided for retrocession of jurisdiction by states to the federal government.

These three sections, in conjunction, can be read only as a recognition by Congress of the continued vitality of Indian tribes and tribal governments and an intent to strengthen Indian self-determination.

But Congress did not leave the matter there, for 25 U.S.C. §1311 directs the Secretary of the Interior to prepare a model code governing the administration of justice by Indian tribal courts, with strong directions for protection of civil rights.

Finally, under 25 U.S.C. §1341, "in order that the constitutional rights of Indians might be *fully* protected" (emphasis supplied), the Secretary is directed to revise "Indian affairs, laws and treaties," and the treatise entitled "Federal Indian Law," and to prepare a compilation of Opinions of the Solicitor of the Interior for Indian Affairs.

(b) *25 U.S.C. §1302 Governs Actions of Tribal Council*

The phrase "powers of self-government" is defined in 25 U.S.C. §1301 as including all executive, legislative, and judicial powers of all Indian tribes and agencies. Clearly,

all actions of tribal government, whether executive or legislative, are governed by 25 U.S.C. §1302, and the very act of lending federal sanction to the enumeration of civil rights by Congress is designed to make it clear to Indian tribes that they are no longer free to act without *specific* restraints.

(c) *25 U.S.C. §1302 Governs Tribal Courts*

In 25 U.S.C. §1301, "tribunals" are defined to include courts of Indian offenses and any Indian tribal courts. Thus, Congress makes clear that all judicial functions, whether criminal or civil actions of tribal courts, and other judicial functions of tribal tribunals are to be governed by the specific restraints of 25 U.S.C. §1302.

(d) *25 U.S.C. §1302 Governs Secretarial Action*

As seen from an examination of tribal constitutions, most significant tribal actions, including amendment of the tribal constitutions themselves, are subject to supervisory control of the Secretary. Prior to enactment of the Act, however, the Secretary had no specific yardstick against which to measure tribal actions involving the civil rights of tribal members. Congress enacted 25 U.S.C. §1302 to remedy that hiatus; accordingly, the Secretary now has a tool to make his supervisory control over Indian affairs effective in protecting the civil rights of tribal members.

(e) *Federal Courts Are Given Habeas Corpus Jurisdiction*

25 U.S.C. §1303 is the only section of the Act which vests any jurisdiction in the federal courts, and then it is limited to testing the legality of tribal detention orders. After rejecting earlier drafts of the Act which would have

provided *de novo* review of all criminal actions of tribal courts, Congress nevertheless felt that deprivation of personal liberty was of sufficient importance to require the carving out of an additional area of jurisdiction in federal courts. But even here, Congress did not waive sovereign immunity of Indian tribes from suit in federal courts; habeas corpus proceedings are unique actions directed only at officials with custody of convicted criminal defendants. 25 U.S.C. §1302 does not authorize Indian tribes themselves to be made parties; it only provides a mechanism to prevent illegal detention of convicted criminal defendants.

Legislative history of the Act supports petitioner's position. In all of the 1,280 pages of hearings held upon the Act from 1961 through 1965, not one word intimates that the Act would waive tribal sovereign immunity, or would vest the federal courts with jurisdiction over questions of tribal membership. *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343, at 1359. *Hearings on Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess., Part 1 (1961), 87 Cong., 1st Sess., Part 2 (1961), 87th Cong., 2d Sess., Part 3 (1962), 88th Cong., 1st Sess., Part 4 (1963); *The Constitutional Rights of the American Indian, Staff of Subcommittee on Constitutional Rights of Senate Committee on the Judiciary*, 88th Cong., 2d Sess. (Committee 1964) *Hearings on S.J. Res. 40 to Protect the Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. (1965); *Constitutional Rights of the American Indian, Staff of*

Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. (Committee 1966); *Hearings on Rights of Members of Indian Tribes before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs*, 90th Cong., 2d Sess. (1968).

As stated in *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343 at page 1359:

> An overview of the legislative records shows that the Senate committee was concerned primarily with criminal trial procedures. Information concerning governmental structure and noncourt practices received less attention...
>
> Discussion of the Indian Bill of Rights showed no intent to use the statute as an instrument for modifying tribal cultural attitudes in order to facilitate assimilation of Indians into the non-Indian community. In fact, the committee showed a positive intent to avoid requirements injurious to the tribes' capacity to function as autonomous governmental units....

The author further states on page 1355:

> In construing the statute, courts should remember that Congress has strongly supported the policy of allowing Indian tribes to maintain their governmental and cultural identity. Such a strong legislative policy should not be seen to be reversed by the legislature unless explicitly done.

In rejecting S. 961, the earlier version of 25 U.S.C. §1302, the Ervin Committee emphasized that peculiarities of the Indian's economic and social position, customs, beliefs and attitudes, raised serious questions about the desirability of imposing upon Indian cultures the legal forms and pro-

cedures to which other Americans had become long accustomed.[14]

As Mr. Frank J. Berry, Solicitor of the Department of the Interior testified:

> On the other hand, the people of Indian Tribes have their roots in an entirely different culture and it may be that the devices which appropriately protected the interests of the Anglo-American of the late 18th Century may not be appropriate to protect the Indian tribal member of the middle 20th century.[15]

Senator Ervin himself underscored Congress' desire to protect Indian self-government and cultural values by stating:[16]

> SENATOR ERVIN. The essential problem that confronts the Congress in this field is whether or not it is possible to establish a relationship with our other levels of government for the reservation Indians in a way that will harmonize with our levels of government and yet at the same time preserve for them such necessary local self-government as would seem to best serve their interest—.

In no sense did the Congress intend that 25 U.S.C. §1302 allow invasion by the federal courts into the areas of the essential political structure of Indian tribes. The Indian Bill of Rights incorporates only selected portions from the federal bill of rights contained in the first ten amendments, and subsection (8) contains an edited ver-

14. Summary Report of Hearings and Investigation on S. Res. 194 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong. 2d Sess., (1966) p. 9.

15. Hearings on S. 961-68 and S.J. Res. 40 to Protect the Constitutional Rights of American Indians before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965) p. 17.

16. Hearings on S. Res. 53 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. —Part 1, (1961) p. 19.

sion of the language of the 14th Amendment. Nowhere are privileges and immunities of citizens mentioned, nor is any mention made in the Act of the right to vote.

Since determination of membership is an essential political attribute of an Indian tribe, 25 U.S.C. §1302 should not be construed to have taken that right from the Indian tribes and to have conferred it upon the federal courts.

Returning to the question of federal court jurisdiction generally, one notes that S. 962, the earlier version of 25 U.S.C. §1303, vested the federal district courts with jurisdiction to hear all criminal convictions in tribal courts *de novo* by a judge and a jury. But these provisions were removed and federal courts were vested with only limited jurisdiction over habeas corpus proceedings. Again Senator Ervin himself recognized this limited effect of the Act in the hearing of April 11, 1969,[17] regarding portions of the proposed S. 211 which restated 25 U.S.C. §1303:

> SENATOR ERVIN. This bill does not provide for the Federal courts to review all the decisions of the Indian courts. In fact, provision for Federal review was in there originally, and at the request of a number of tribes we eliminated that entirely. *The only provision in this bill that provides for Federal court interference is writ of habeas corpus, and that probably exists as law now, although I am not quite certain. If the man was convicted in violation of a law, the Federal court would have the jurisdiction to issue a writ of habeas corpus.* I don't imagine that there would be too many of those.

(Emphasis supplied).

The doctrine of sovereign immunity of Indian tribes was

17. Hearing on Title II of the Civil Rights Act of 1968 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., (1969) p. 15.

of such long standing and so well known that Congress must have been well aware of it. Yet Congress refrained from any declaration waiving immunity for the purposes of the Indian Civil Rights Act of 1968. When the entire Act is viewed against a backdrop of tribal sovereignty, it becomes completely clear that Congress chose in the Act to proceed in a limited fashion by strengthening tribal governments, encouraging tribal self-determination and yet at the same time preserving the civil rights of tribal members. Congress acted knowing full well that it retained plenary jurisdiction over Indian tribes and that if tribal courts in civil and criminal matters, tribal councils in executive and legislative matters, and the Secretary in supervision, failed to protect the civil rights of tribal members, then Congress could take the more drastic step of vesting the federal courts with additional jurisdiction, perhaps to review all tribal court cases, and perhaps to review executive and legislative actions of tribal councils as well.

Until Congress takes such additional steps, it is wholly unwarranted for the federal courts to conclude that Congress has made an *implicit blanket waiver* of tribal sovereign immunity. It is especially insidious to the existence of tribal governments for federal courts to attempt to read 25 U.S.C. §1302 in conjunction with 28 U.S.C. §1343(4) in such manner as to throw open the floodgates of litigation, dangling as a reward to potential civil rights litigants the collection of damages and attorneys fees from Indian tribal governments. Yet this is exactly what the 9th Circuit Court of Appeals has done in *Thompson* and *Laramie*, referring to its earlier holding in *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200 (9th Cir. 1973).

In 1968 as now, most Indian tribes were impoverished and able to continue functioning as autonomous units of government only because they were able to conserve assets and obtain federal grants for improving and enlarging their governmental functions. Their traditional sovereign immunity from suit in federal courts has protected them from damage suits which would literally destroy them through depletion of their meager assets. To allow *Thompson* and *Laramie* to stand in striking down tribal sovereign immunity is unthinkable in light of the intent of Congress in enacting The Indian Civil Rights Act.

In keeping with the rule that tribal sovereign immunity is not likely to be considered abrogated, this legislative history, especially Senator Ervin's statement of his understanding that 25 U.S.C. §1303 is the only provision in the Act "that provides for federal court interference," is conclusive.

6. Plaintiffs Thompson and Laramie Have No Property Interests Protectable Under Equal Protection And Due Process Provisions of The Indian Civil Rights Act of 1968

Wholly apart from any consideration of tribal sovereign immunity is the question whether plaintiffs Thompson and Laramie have a protectable property interest. Clearly "equal protection" and "due process" have different meanings in a tribal context than in a federal context,[18] but the plaintiffs' *averred* property interests—entitlement to adoption and sharing in per capita and dividend payments—are insufficient even under federal standards.

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18. The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv. L. Rev. 1343 at 1352.

As stated in FEDERAL INDIAN LAW at page 747:

> It is often said that the individual has only a 'prospective right' to future income from tribal property in which he has no present interest. Other terms used to picture this right are 'an inchoate interest,' and a 'float.' These terms aptly characterize the intangible right of the Indian to share in tribal property. Until the property loses its tribal character and becomes individualized, his right can be no more than this, except insofar as Federal law, tribal law, or tribal custom may give him a more definite right of occupancy in a particular tract. In the case of tribal funds, he has, ordinarily, no vested right in them until they have been paid over to him or have been set over to his credit, perhaps subject to certain restrictions.

FEDERAL INDIAN LAW further states:

> The general rule is that 'in the absence of [statutory] provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends upon tribal membership, is terminated when the membership is ended, and is neither alienable nor descendible.' *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 216, (1930).

FEDERAL INDIAN LAW, page 44, note 5.

Obviously, the mere expectancy of adoption of plaintiffs Thompson and Laramie is a lesser property interest than that of enrolled tribal members as in *Kadrie, supra*, and provides an even more ephemeral right to tribal assets and per capita payments. But plaintiffs claim denial of *procedural* as well as substantive due process. Does their expectancy of adoption entitle them to *procedural* due process of law?

The answer is that it does not. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548, (1972) involved a non-tenured professor who was neither rehired by a state university nor given an opportunity

to challenge the decision of the Board of Regents not to rehire him. Assistant Professor Roth sought declaratory and injunctive relief, averring denial of procedural due process. The 7th Circuit Court of Appeals agreed and granted him a hearing. But the Supreme Court reversed and remanded, stating:

> The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. We hold that he did not.
>
> I
>
> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

408 U.S. at 569.

The Supreme Court went on to point out:

> . . . a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. See *Morrissey v. Brewer*, 408 U.S. p. 471, at 481, 33 L. Ed. 2d, p. 484, at 494, 92 92 S. Ct. 2593. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

408 U.S. at 570.

In discussing the nature of property protected by the due process clause, the Supreme Court stated:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their

> dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577.

The Supreme Court's holding that

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it,

408 U.S. at 561.

is especially applicable to these cases since the Colville Confederated Tribes have *unfettered discretion* as to whom they adopt, and no person can possibly have anything more than a "unilateral expectation" of being adopted.

These conclusions govern not only the expectancy of adoption by the plaintiffs, but, in addition, plaintiff Thompson's claim to deprivation of property without due process of law through her original disenrollment. She admits that her allotment, her *only* vested property right, has not been taken from her and that she has received a fee patent upon it. Besides, she was awarded complete procedural due process at the disenrollment hearing including adequate notice, the right to present witnesses, and the right to be represented by counsel if she chose (R. 43). Accordingly, plaintiff Thompson cannot even aver denial of procedural due process.

7. Dismissal of Thompson and Laramie Must be Upheld Even if 25 U.S.C. §1302 Were Held to Confer Jurisdiction on the Federal Courts, Since the Complaints Lack Sufficient Averments of Violation of the Equal Protection and Due Process Provisions of 25 U.S.C. §1302

Whether a federal court has jurisdiction of an action must be determined from the allegations of fact in the complaint without regard to mere conclusionary allegations of jurisdiction. *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971); *Simpson v. State of Utah*, 365 F.2d 185 (10th Cir. 1966); *Mosher v. City of Phoenix*, 287 U.S. 29, 53 S. Ct. 67, 77 L. Ed. 148 (1932); *Eastern Airlines, Inc. v. Flight Engineers International Association*, 340 F.2d 104 (5th Cir. 1965).

The equal protection and due process clauses of 25 U.S.C. §1302(8) provide that an Indian tribe shall not

> (8) deny to any person within its jurisdiction the equal protection of *its* laws or deprive any person of liberty or property without due process of law;

(Emphasis supplied).

The word "its" is of crucial significance and refers not to provisions of the United States Constitution, or to federal statutes, *but to the laws of the Colville Confederated Tribes.* In these cases, such laws comprise (1) Article VII of the tribal constitution, (2) Resolutions 1967-186 and 1969-349, and (3) customs and practices of the Tribes. FEDERAL INDIAN LAW, at 396.

The averments of the two complaints must be measured by these laws to determine whether either avers a legally sufficient violation of 25 U.S.C. §1302.

(a) *Averments of Thompson Complaint*

Plaintiff Thompson's complaint comprises two basic claims: (1) Her disenrollment in 1957 was unconstitutional by reason of *Afroyim v. Rusk*, 387 U.S. 253 (1967), 87 S. Ct. 1660, 18 L. Ed. 2d 757, and (2) denial of her petition for adoption in 1971 without a hearing violates the equal protection and due process provisions of 25 U.S.C. §1302. The two separate claims are governed by different rules and must be considered separately.

(1) *Claim of illegal disenrollment.* As a matter of law, plaintiff Thompson is precluded from grounding her action upon her disenrollment in 1957, since 25 U.S.C. §1302 was enacted in 1968 and cannot be applied retroactively. In *LaPeyre v. United States*, 84 U.S. 191, 21 L. Ed. 606 (1972), the Supreme Court held at page 198:

> There is no statute fixing the time when acts of Congress shall take effect, but it is settled that where no other time is prescribed, they take effect from their date.

The date of enactment of 25 U.S.C. §1302 is April 11, 1968.

But for the sake of avoiding repeating a legal argument for two different factual patterns, it is assumed, arguendo, that 25 U.S.C. §1302(8) applies retroactively. It follows that plaintiff Thompson's right to equal protection in 1957 was the right of equal application of the laws of the Tribes governing disenrollment of alien Indians who had abandoned tribal relations.

The complaint contains no averment that applicable tribal laws were not properly applied to her, but proceeds exactly in the wrong direction by averring that such tribal laws *were* applied to her. That is precisely what she com-

plains of, based on the argument that just as *Afroyim* prohibits the federal government from stripping American citizenship from one who votes in a foreign election, the Tribes are prohibited from disenrolling a member as an "alien Indian" in part upon his voting in a foreign election.

Plaintiff Thompson misreads *Afroyim*. The Supreme Court held that through the 14th Amendment the American people placed citizenship beyond the power of any government unit to destroy. 387 S. Ct. at 263. In contrast, the members of the Colville Confederated Tribes have constitutionally authorized the Colville Business Council to destroy tribal membership through disenrollment proceedings. And that power has acquired federal sanction through approval of Article VII of the tribal constitution by the Secretary on April 14, 1950.

There remains a consideration of the true basis for plaintiff Thompson's disenrollment in 1957. Resolution 1957-113 disenrolled Mrs. Thompson as an "alien Indian" who had abandoned her tribal relations (R. 43). The factual grounds for the action were (1) Her admitted 20-year residency in Canada (R. 36), and (2) her admitted Canadian citizenship (R. 35). The Colville Business Council merely considered as additional evidence of expatriation her voting in a Provincial election on June 9, 1953, but it found her to be an alien Indian on March 21, 1952, more than a year before the election. Unquestionably the Colville Confederated Tribes may define the word "alien" in any manner they choose, for the Supreme Court has upheld the right of an Indian tribe to take away the citizenship of a member by legislative enactment *without the statement of any reason therefor. Roff v. Burney, supra.*

In fact, the power of an Indian tribe to disenroll tribal members is so clearly plenary that Congress found it necessary to include in the Act of May 2, 1890, Chapter 182, 26 Stat. 99, a provision prohibiting Indian tribes from disenrolling members *because they became citizens of the United States* under the provisions of the Act.

The Colville Confederated Tribes have chosen to deny continued membership to tribal members who voluntarily abandon tribal relations and become aliens. Their right to determine when those preconditions have been met remains *solely* within the province of their undiminished authority to determine membership questions.

(2) *Claim of illegal denial of adoption.* Plaintiff Thompson's second claim, that her petition for adoption in 1970 was illegally denied by the Colville Business Council, clearly fails to withstand scrutiny. Since her right to be adopted is a mere "unilateral expectation," it does not rise to the threshold status required for protection even by procedural due process.

Amidst the conclusionary allegations of plaintiff Thompson's complaint is one factual allegation which demands attention, namely, that the Tribes have enrolled other persons based on fact patterns identical to hers.[19] Based upon this averment of discrimination, plaintiff Thompson claims denial of equal protection of tribal law under 25 U.S.C. §1302.

But it is hornbook law that a claim of denial of equal protection cannot be supported by mere allegations that the law is unfaithfully administered by those charged with

19. App. C, p. A-14, paragraph XVII.

its execution. 16 Am. Jur. 2d, *Constitutional Law* §541 at page 930.

Indeed, in the landmark decision of *Snowden v. Hughes,* 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944), *rehearing denied,* 321 U.S. 804 (1944), the Supreme Court ruled that the failure to allege facts showing an *intentional or purposeful discrimination* between persons or classes is *fatal* to an action in the federal courts claiming denial of equal protection. In *Snowden,* plaintiff alleged that (1) Illinois law required that *two* persons be certified as Republican nominees as a result of a primary, (2) plaintiff received the second-highest number of votes cast for the Republican nomination, (3) defendants, members of an Illinois state election board, arbitrarily refused to certify plaintiff as a nominee as a result of the primary, (4) defendants' refusal prevented plaintiff's name from appearing on the ballot for the general election, and (5) defendants certified the other Republican nominee as the *only* Republican nominee for the general election.

Dismissal of plaintiff's complaint was affirmed by the Supreme Court which held:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection *unless there is shown to be present in it an element of intentional or purposeful discrimination.*

(Emphasis supplied). 321 U.S. at 8.

The Supreme Court added:

> *The lack of any allegations* in the complaint here, *tending to show a purposeful discrimination* between persons or classes of persons *is not supplied* by the opprobrious epithets 'willful' and 'malicious' applied

> to the Board's failure to certify petitioner as a successful candidate, or by *characterizing that failure as unequal, unjust, and oppressive administration of the laws of Illinois.*

(Emphasis supplied). 321 U.S. at 10.

The Supreme Court concluded:

> *Such allegations are insufficient under our decisions to raise any issue of equal protection of the laws* or to call upon a federal court to try questions of state law in order to discover a purposeful discrimination in the administration of the laws of Illinois which is not alleged.

(Emphasis supplied). 321 U.S. at 10.

Plaintiff Thompson also fails to allege any intentional or purposeful discrimination between persons or classes. On its face, then, the complaint fails to raise any issue of equal protection of the laws. Therefore, this action must be dismissed.

(b) ***Averments of Laramie Complaint***

The Laramie complaint contains no averment as to when the applications for adoption of the three Laramie children were made. The Affidavit of Mel Tonasket (R. 61) makes it clear that *oral* applications were made after April 18, 1963, when the youngest child was five years of age. But the complaint also fails to aver *when* the Colville Business Council acted upon the oral applications. Nothing indicates that the Council acted on them *after* April 11, 1968, the date on which 25 U.S.C. §1302 was enacted. Under the rule of *LeMieux Bros. v. Tremont Lumber Co., supra*, it will be presumed that the federal courts lack jurisdiction unless the contrary affirmatively appears. And since 25 U.S.C. §1302 cannot be applied retroactively,

LaPeyre v. United States, supra, the oral applications cannot support this action. In any event, all adoptions were closed between June 20, 1961 (R. 73) and December 16, 1966 (R. 74) with the sanction of the federal government.

But what of the written applications for adoption filed January 22, 1968? Those applications are clearly governed by resolutions 1967-186 (R. 76) and 1969-349 (R. 77). Under those resolutions, the three Laramie children were ineligible for adoption under §4 of the two resolutions since they had been duly enrolled members of another recognized Indian tribe. In addition, rejection of their applications for adoption is conclusive that they were not acceptable to the Colville Business Council as tribal members under §5 of the two resolutions.

The complaint contains no averment that applicable tribal laws were not properly applied to the three Laramie children, but proceeds exactly in the wrong direction by averring that such tribal laws *were* applied to them. Accordingly, the complaint is fatally defective upon its face as a matter of law.

Just as in *Thompson,* plaintiff Laramie's complaint contains a factual allegation that the Tribes have adopted other persons based on fact patterns identical to those of the Laramie children.[20] And similarly, plaintiffs Laramie claim denial of equal protection of tribal laws under 25 U.S.C. §1302.

But a cursory examination of the complaint reveals that the averments are as defective as those in the Thompson complaint and that under the rule of *Snowden v. Hughes,*

20. App. C, p. A-20, paragraph V.

supra, the complaint must fall and this action must be dismissed as a matter of law.

8. The Thompson and Laramie Decisions Create a Conflict Among the Circuits

The question of abrogation of tribal sovereign immunity with respect to essential political matters by 25 U.S.C. §1302 has been adjudicated by the 10th Circuit Court of Appeals. *Slattery v. Arapahoe Tribal Council*, and *Pinnow v. Shoshone Tribal Council*, 453 F.2d 278 (1971).

Both *Slattery* and *Pinnow* are founded upon claims that the requirements of the tribal enrollment ordinances, namely, (1) one-quarter Indian blood and (2) the filing of enrollment applications within two years of birth were not applied to others with the same vigor as they were to the Slattery or Pinnow children. Admittedly, none of the Slattery or Pinnow children met the Indian blood requirement and the applications for all but one child were filed more than two years from their birthdates. Most significant, just as in *Thompson* and *Laramie*, the pleadings in *Slattery* and *Pinnow* did not attack the tribal enrollment ordinance but relied upon claims of discrimination.

Looking past the conclusionary allegations of jurisdiction in keeping with *Groundhog v. Keeler, supra*, and having examined affidavits filed in the lower court, the 10th Circuit Court of Appeals found nothing to indicate a continuing and overall pattern of discriminatory, unfair, and inequitable treatment required by *Snowden v. Hughes, supra*, and held that the federal courts had no jurisdiction to hear the controversies.

The *Thompson* and *Laramie* complaints are even weaker

than those of *Slattery* and *Pinnow* and fail as a matter of law to raise due process and equal protection issues. Unless these cases are reversed, approximately 200 other persons who were disenrolled in the 1950's and 150 other persons who were denied adoption will follow suit and force the Tribes to expend their precious and much needed tribal funds in defending baseless lawsuits. Finally, *Thompson* and *Laramie* throw the various circuits into disarray and invite every person with a trace of Indian blood to attempt to thrust himself forcibly onto the rolls of already impoverished Indian tribes.

9. Plaintiffs' Complaints Must be Dismissed For Failure to Name the United States as an Indispensible Party

Congress, in the exercise of its exclusive power over Indian commerce has acted in 25 U.S.C. §§2, 163, and 1701 to grant the Secretary of the Interior authority over tribal membership matters. The Secretary has exercised his power by approving Article VII of the tribal constitution and Resolutions 1967-186 and 1969-349.

Since every payment of tribal funds in controversy has been made pursuant to a federally sanctioned tribal roll, plaintiffs Thompson and Laramie may not question their exclusion from the tribal roll or their failure to participate in per capita and dividend payments without joining the United States as an indispensable party under Rule of Civil Procedure 19(a)(1).

CONCLUSION

For the reasons stated, petitioners respectfully request that Writs of Certiorari issue to review the Judgments of the United States Court of Appeals for the Ninth Circuit in *Thompson v. Tonasket*, 487 F.2d 316 (1973) and *Laramie v. Nicholson*, 487 F.2d 315 (1973).

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET
& ERNSTOFF
ROBERT L. PIRTLE
ALVIN J. ZIONTZ,
Attorneys for Petitioners

February 20, 1974

APPENDIX A

OPINIONS BELOW

THOMPSON V. TONASKET

ALICE M. THOMPSON, Plaintiff-Appellant,

v.

MEL TONASKET et al., as members of the Colville Business Council of The Colville Confederated Tribe, and The Colville Confederated Tribe, Defendants-Appellees.

No. 72-1193.

United States Court of Appeals,
Ninth Circuit.

Nov. 2, 1973.

PER CURIAM:

This case presents the same jurisdictional question as was presented in the case of Laramie v. Nicholson, 9 Cir., 1973, 487 F.2d 315. As in that case, the trial judge held that he had no jurisdiction and dismissed the action. The judgment is reversed on the authority of Laramie v. Nicholson, *supra*, and of Johnson v. The Lower Elwha Tribal Community, 9 Cir., 1973, 484 F.2d 200.

As in the Laramie case, we express no opinion on the merits of the case because the trial court did not reach that question. The judgment is reversed and the case is remanded for further proceedings.

LARAMIE V. NICHOLSON

JUNE KAREN LARAMIE et al., Plaintiffs-Appellants,

v.

NARCISSE NICHOLSON, JR., et al., Defendants-Appellees

No. 72-1264.

United States Court of Appeals,
Ninth Circuit.

Oct. 9, 1973.

DUNIWAY, Circuit Judge:

The appealing plaintiffs are children whose mother is a member of the Colville Confederated Tribe of Indians. They seek to be enrolled as members of the tribe. The trial judge dismissed their action for want of jurisdiction, relying on our decision in Fondahn v. Native Village of Tyonek, 9 Cir. 1971, 450 F.2d 520. We reverse and remand.

Although plaintiffs met all other requirements for enrollment in the tribe, they were refused enrollment by the Business Council of the tribe because they had previously been enrolled members of another tribe. Council Resolution 1967-186, Section 4 provided:

> "If the applicant is already a duly enrolled member of another recognized tribe, this will deem the applicant automatically ineligible for adoption in the Colville Confederated Tribes, regardless of whether the applicant offers to relinquish his or her rights with the other tribe."

This requirement was amended in 1969, by Resolution 1969-349, adopted after the action by the Council in the present case, to disqualify also those who had in the past been members of another tribe.

Plaintiffs allege that the Colville Business Council agreed to enroll them if the Commissioner of Indian Affairs of the Department of the Interior ruled that this was not prohibited by Resolution 1967-186. They say that the Commissioner so ruled, but that the Council still refused to take further action, even though other individuals having the same supposed disqualification were enrolled in the tribe. This is the factual basis for plaintiffs' claim of a denial of the equal protection of tribal law.

Plaintiffs claim that violation of the so-called Indian Bill of Rights, 25 U.S.C. §§ 1301-1303, enacted in 1968 (82 Stat. 77), gives rise to a civil action and that 28 U.S.C. §1343(4) confers jurisdiction on the District Court. We agree. We have recently so held. Johnson v. Lower Elwha Tribal Community, 9 Cir., 1973, 484 F.2d 200 (1973).

In that case, the claim was that the plaintiff had been deprived of due process of law in violation of 25 U.S.C.

§1302(8). In this case, the claim is that the plaintiffs have been deprived of the equal protection of the tribal laws, in violation of the same section. We see no difference in principle that distinguishes our *Johnson* case from this case.

Our decision in *Fondahn, supra,* is not to the contrary. It is true that the case was decided in 1971, more than three years after the enactment of the Indian Bill of Rights on April 11, 1968. But it is also true that the statute was not brought to our attention, and we did not even purport to decide what its effect upon jurisdiction might be. Instead, we followed pre 1968 law, adopting and applying the reasoning of the Tenth Circuit in Martinez v. Southern Ute Tribe, 10 Cir., 1957, 249 F.2d 915. The Tenth Circuit has indicated that Martinez may no longer be good law. In Slattery v. Arapahoe Tribal Council, 10 Cir., 1971, 453 F.2d 278, 281, the Tenth Circuit, in dictum, and after citing Martinez, said:

> "It may well be that tribal enrollment practices are now subject to the statutory requirements of equal protection and due process as provided in 25 U.S.C. § 1302(8). See The Indian Bill of Rights and the Constitutional Statute (sic) of Tribal Government, 82 Harv.L.Rev. 1343 [1372-73] (1969). However, the existence of such restraint and the extent thereof need not here be decided." 453 F.2d at 281.

The case was decided on the ground that no violation of the statute was shown. We conclude that *Fondahn, supra,* does not control this case.

We do not consider the merits of the plaintiffs' claim; that is a matter for the district court in the first instance. We only hold that the court did have jurisdiction under 28 U.S.C. § 1343(4) and 25 U.S.C. § 1302(8).

The judgment is reversed and the case is remanded for further proceedings.

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

UNITED STATES CONSTITUTIONAL PROVISION:

UNITED STATES CONSTITUTION, ART. I §8, cl. 2

The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;

UNITED STATES STATUTES:

25 U.S.C. §§ 1301-3.

§ 1301. Definitions.

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense. (Pub. L. 90-284, title II, § 201, Apr. 11, 1968, 82 Stat. 77.)

§ 1302. Constitutional rights.

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable

cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any crimnial case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(Pub. L. 90-284, title II, § 202, Apr. 11, 1968, 82 Stat. 77.)

§ 1303. Habeas corpus.

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe. (Pub. L. 90-284, title II, § 203, Apr. 11, 1968, 82 Stat. 78.)

TRIBAL CONSTITUTIONAL PROVISIONS

ARTICLE VII OF THE CONSTITUTION AND BY-LAWS OF THE COLVILLE CONFEDERATED TRIBES

ARTICLE VII, MEMBERSHIP OF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION. —There shall be added a new provision governing membership of the Confederated Tribes of the Colville Reservation which shall read as follows:

Section 1.—The membership of the Confederated Tribes of the Colville Reservation shall consist of the following:

(a) All persons of Indian blood whose names appear as members of the Confederated Tribes on the official census of the Indians of the Colville Reservation as of January 1, 1937, provided that, subject to the approval of the Secretary of the Interior corrections may be made in said roll within two years from the adoption and approval of this amendment.

(b) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining a permanent residence on the Colville Indian Reservation.

(c) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining residence elsewhere in the continental United States, provided that the parent or guardian of the child indicate a willingness to maintain tribal relations and to participate in tribal affairs. To indicate such willingness to maintain tribal affiliation, the parent or guardian shall, within six months after the birth of the child submit a written application to have the child enrolled. The application shall be accompanied by the child's birth certificate together with any other evidence as to the eligibility of the child for enrollment in the Confederated Tribes of the Colville Reservation. If the certificate and application are not filed within the designated time, the child will not be enrolled.

Section 2. The Business Council of the Confederated

Tribes shall have power to prescribe rules and regulations governing future membership in the tribes, including the adoption of members and loss of membership, provided:

(a) That such rules and regulations shall be subject to the approval of the Secretary of the Interior.

(b) That no person shall be adopted who possesses less than one-fourth degree Indian blood.

(c) That any member who takes up permanent residence or is enrolled with a tribe, band or community of foreign Indians shall lose his membership in the Colville Tribes.

Alien Indians may be deleted from the rolls after they have been given an opportunity to be heard in their own behalf. The tribe shall also take appropriate action to correct the existing tribal roll and, if necessary, delete from the rolls alien Indians whose names appear on the rolls of the Confederated Tribes and who have abandoned tribal relations. The Colville Confederated Tribes shall not deprive anyone of vested property rights, such as allotments or inherited interests. (*Adopted by Confederated Tribes May* 20, 1949. *Approved by Commissioner of Indian Affairs April* 14, 1950.)

Section 3. After July 1, 1959, no person shall be admitted to membership in the Confederated Tribes of the Colville Reservation unless such person possesses at least one-fourth (¼) degree blood of the tribes which constitute the Confederated Tribes of the Colville Reservation. (*Adopted by the Colville Confederated Tribes on May* 9, 1959. *Approved by the Acting Commissioner of Indian Affairs July* 2, 1959).

TRIBAL RESOLUTIONS

RESOLUTION NO. 1967-186

BE IT HEREBY RESOLVED, by the Colville Business Council, governing body of the Confederated Tribes of the Colville Reservation, meeting in Special Session at the Colville Indian Sub-Agency, Nespelem, Washington, acting for and on behalf of the Colville Confederated Tribes this 2nd day of June, 1967, that Colville Resolution No.

1966-393 is hereby rescinded in its entirety and the following rules for membership, by adoption, in the Colville Confederated Tribes are hereby established:

Section 1—Applicants must be citizens of the United States and subscribe to the Constitution thereof and to the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation.

Section 2—Applicants must possess at least one-fourth (¼) degree of Indian blood of the tribes which constitute the Confederated Tribes of the Colville Reservation, and such blood must be computed from documentary evidence obtained from sources acceptable and recognized by the Colville Business Council and consistent with the January 1, 1937 Basic Membership Roll.

Section 3—At least one of the applicant's parents must be a duly enrolled member of the Confederated Tribes of the Colville Reservation.

Section 4—If the applicant is already a duly enrolled member of another recognized tribe, this will deem the applicant automatically ineligible for adoption in the Colville Confederated Tribes, regardless of whether the applicant offers to relinquish his or her rights with the other tribe.

Section 5—Applicants must possess good character and otherwise be acceptable to the Business Council as a tribal member. Applicants must state under oath that he or she has not been convicted of any offense involving dishonesty during the preceding five years.

RESOLVED FURTHER, that the Secretary of the Interior, or his duly authorized representative, is hereby requested to give top priority in reviewing this resolution so that the authority to approve tribal adoption cases will again be delegated to the Colville Business Council, thereby preventing any undue delay in the processing of tribal adoption cases.

The foregoing was duly enacted by the Colville Business Council by a vote of 6 FOR and 4 AGAINST, under authority contained in Article V, Section 1(a) of the Con-

stitution and By-Laws of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938 and approved by the Commissioner of Indian Affairs on April 19, 1938; and under further authority contained in Article VII, Section 2 of the Constitution and By-Laws, adopted by the Confederated Tribes on May 20, 1949 and approved by the Commissioner of Indian Affairs on April 14, 1950.

ATTEST:

Narcisse Nicholson, Jr.

Narcisse Nicholson, Jr., Chairman
Colville Business Council

RESOLUTION NO. 1969-349

WHEREAS, by enactment of Resolution 1967-186, dated June 2, 1967, the Business Council established rules for membership by adoption; and

WHEREAS, the above cited resolution was approved by the Deputy Assistant Commissioner of Indian Affairs on August 2, 1967; and

WHEREAS, Sections 4 and 5, of Resolution 1967-186 are not clear as to their meaning; and

WHEREAS, it is the recommendation of the Enrollment Committee to amend Sections 4 and 5 of Resolution 1967-186.

NOW, THEREFORE, IT IS HEREBY RESOLVED, that we, the Colville Business Council, meeting in Special Session at the Colville Indian Sub-Agency, Nespelem, Washington, acting for and on behalf of the Colville Confederated Tribes this 22nd day of September, 1969, do hereby approve the recommendation of the Enrollment Committee. Sections 4 and 5 shall be amended to read as follows:

"Section 4—If the applicant is already a duly enrolled member, or has in the past been a duly enrolled member of another recognized Indian tribe, this will deem the applicant ineligible for adoption in the Colville Confederated Tribes, regardless of wheth-

er the applicant offers to relinquish, or has relinquished, his or her rights with the other tribe."

"Section 5—Applicants must possess good character and otherwise be acceptable to the Business Council as a tribal member. Applicants, excluding minors, must state under oath that he or she has not been convicted of any offense involving dishonesty during the preceding five years."

RESOLVED FURTHER, that the Secretary of the Interior, or his duly authorized representative, is hereby requested to give top priority in reviewing the amendment to Resolution 1967-186.

The foregoing was duly enacted by the Colville Business Council by a vote of 11 FOR and 0 AGAINST, under authority contained in Article V, Section 1(a) of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

ATTEST:

Narcisse Nicholson, Jr.

Nascisse Nicholson, Jr., Chairman
Colville Business Council

APPENDIX C

COMPLAINTS

THOMPSON COMPLAINT

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

ALICE M. THOMPSON, *Plaintiff,* v. MEL TONASKET, CLARENCE DESAUTEL, LUCY COVINGTON, BARBARA MARCHAND, CHARLES QUINTASKET, GABE MOSES, SHIRLEY PALMER, ANDY JOSEPH, BARNEY RICKARD, AL AUBERTIN, ALICE LAWRENCE, ROY SEYLOR, GEORGE MEUSY, JOE KOHLER, as members of the COLVILLE BUSINESS COUNCIL of The Colville Confederated Tribe, and THE COLVILLE CONFEDERATED TRIBE, *Defendants.*	Civil No. 3540 COMPLAINT

Comes now the Plaintiff above named and for cause of action against the Defendants alleges and shows the Court as follows:

I.

That at all times herein mentioned the following were the members of the Colville Business Council of the Colville Confederated Tribe: Mel Tonasket, Clarence Desautel, Lucy Covington, Barbara Marchand, Charles Quintasket, Gabe Moses, Shirley Palmer, Andy Joseph, Barney Rickard, Al Aubertin, Alice Lawrence, Roy Seylor, George Meusy and Joe Kohler.

II.

That at all times herein mentioned the Colville Confed-

erated Tribe was a tribe of Indians, with its holdings and main place of business located within Okanogan and Ferry Counties, State of Washington.

III.

That at all times herein mentioned the Colville Business Council was composed of members of the Colville Confederated Tribes, with their principal place of business in Nespelem, Washington, and Coulee Dam, Washington.

IV.

That at all times herein mentioned, the Plaintiff herein Alice M. Thompson, was also known as Alice Margaret McDonald.

V.

That the Plaintiff was born August 25, 1911, near Oroville, Okanogan County, Washington, and that her place of birth was recorded September 2, 1911, with the Registrar of Births in Olympia, Washington.

VI.

That the Plaintiff is an American citizen by birth, and has always retained her rights as an American citizen and has never in any manner given up such rights.

VII.

That the Plaintiff is married to Louis Raymond Thompson, an American citizen born in Sprague, Washington, who has always retained his rights as an American citizen.

VIII.

That the Plaintiff was enrolled on the Colville Indian rolls on or about November 2, 1911; that the Plaintiff remained on the Colville rolls from the time she was placed thereon, and had an allotment on the Colville Reservation up to the date of approximately 1953; that the Plaintiff received her per capita payments and all payments given to other members of the Colville Tribe up through the year of 1952.

IX.

That on or about the year of 1953, the Plaintiff was improperly stricken from the rolls of the Colville Confederated Tribe and deleted therefrom as a member; that on or about the year of 1958 the Plaintiff received her Patent in Fee to her allotment.

X.

That the alleged reason that the Plaintiff was stricken from the rolls of the Colville Confederated Tribes by an action of the tribal council and/or the Colville Business Council of the Colville Confederated Tribes; that the alleged reason she was stricken from the rolls was based upon the claim that the Plaintiff was a Canadian and not an American citizen; that in truth and in fact, this was not so, and the Plaintiff at all times has been an American citizen and was not a Canadian Indian.

That at the time the Plaintiff was improperly stricken from the rolls of the Colville Confederated Tribe, she protested this, but had no control by which to stop her name being deleted from the rolls, and such action was taken, which the Plaintiff alleges was not a proper act in any respect; that the action was taken without the Plaintiff having full right of representation at the hearing and without her having full right to present her evidence to the council or to the proper authorities.

XI.

That allegedly the reason the Plaintiff was stricken from the rolls was that she had voted in a foreign election in Canada, and by so doing, had lost her American citizenship. They contended they were acting under 8 U.S.C. §1481 (a)(5) and under the ruling of *Perez v. Brownell*, 356 U.S. 44 (1958). 8 U.S.C. §1481 (a)(5) was declared unconstitutional by the case of *Afroyim v. Rusk*, 387 U.S. 253 (1967), and the *Perez v. Brownell* case was overruled by the *Afroyim v. Rusk* case, and by the unconstitutional 8 U.S.C. §1481 (a)(5).

XII.

The *Plaintiff has again petitioned* to the Colville Busi-

ness Council to be enrolled as a member of the Colville Confederated Tribe, and they and the enrollment committee were advised by the United States Department of the Interior, Bureau of Indian Affairs, in Washington, D.C., that based upon the law that the Council did not have the authority, and the enrollment committee did not have the authority, to determine whether a tribal member would lose their nationality by voting in a foreign election and did not have the authority to declare that the Plaintiff herein had lost her right to remain a member of the Colville Confederated Tribe by declaring that she had voted in a foreign election.

XIII.

That even though the Colville Business Council and the Colville Confederated Tribe and the Enrollment Committee were advised of this, *they still have refused to act* upon the application of the Plaintiff herein to be placed back on the rolls of the Colville Confederated Tribe.

XIV.

That the Plaintiff meets all of the requirements for membership in the Colville Confederated Tribe, and is an American citizen, and Defendants had no right whatsoever to strike her from the rolls.

XV.

That although repeated requests were made for the reenrollment of the Plaintiff, the Tribal Council and the Enrollment Committee *have refused to take any action thereon.*

XVI.

That the actions of the Colville Confederated Tribe, the Business Council and the Enrollment Committee was arbitrary and capricious and illegal and unconstitutional and in violation of the Plaintiff's constitutional rights as an American citizen, as they had declared that she no longer was an American citizen.

XVII.

That many other individuals have been enrolled in the

Colville Confederated Tribe, without having to show all of the facts that this plaintiff has had tc show, and who had some of the disqualifications that were claimed to exist against the Plaintiff herein; that the said tribal council has discriminated against the Plaintiff, contrary to law, even though she has met all of the requirements to be re-enrolled in the tribe.

That the said acts of discrimination against the Plaintiff are contrary to the laws of the United States, being *42 U.S.C.A. 1981* and all pertinent sections under the Civil Rights Acts under Title 42, and the United States Constitution and all pertinent sections thereof.

That 25 U.S.C.A. ∫ 1302 provides that no Indian tribe in exercising powers of self government shall deny to any person within its jurisdiction the equal protections of the laws, or deprive any person of liberty or property without process of law.

That by the arbitrary, capricious, and discriminatory action of the Business Council of the Colville Confederated Tribe, the Colville Confederated Tribe and the Enrollment Committee, *the Plaintiff has been denied equal protection of the laws and has been deprived of property without due process of law.*

XVIII.

That a Federal question is involved; that the United States District Court has jurisdiction of the persons and subject matter herein.

XIX.

That if the Plaintiff is placed back on the rolls of the Colville Confederated Tribe, *it would mean that she would have an interest in the Colville Confederated Tribe* and would receive benefits from the Colville Confederated Tribe.

That certain benefits have been paid to the members of the Colville Confederated Tribe through per capita and otherwise, for a number of years, and since 1953, and that Plaintiff is entitled to have these benefits paid to her from the date that she was improperly stricken from the

rolls of the Colville Confederated Tribe to the date of hearing of this Complaint and the decision of the Court, as such benefits are earned benefits to which the Plaintiff is entitled, and is being improperly deprived of, without due process of law; that the exact amount of such benefits are unknown to the Plaintiff, but will be alleged and testified to at the time of trial, said benefits being for per capita payments and other payments made to members of the tribe since 1953.

That the Plaintiff should be allowed a reasonable attorney's fee against the Defendants for the bringing of this action, as the Defendants have, without proper authority, discriminated against the Plaintiff, and without proper authority have stricken the Plaintiff from the tribe's rolls, and that a reasonable attorney's fee would be the sum of $5,000.00.

That the Plaintiff has no other adequate remedy at law.

That the Defendants now refuse to act upon Plaintiff's petition, even though they have been instructed as to what the law is and what the rights of the Plaintiff are, and by so doing, the said Defendants are continuing to deprive the Plaintiff of her property without due process of law and of her rights, without due process of law.

WHEREFORE, the Plaintiff prays for Judgment against the Defendants as follows:

1. That the Court decree that the Plaintiff be re-instated and re-enrolled as a member of the Colville Confederated Tribe, and that her name be placed retroactively upon the rolls, effective as of the date of 1952, and that the Court order and decree that the Colville Business Council and the Colville Confederated Tribe and the Enrollment Committee enact the necessary Resolution to approve the application of the Plaintiff for the placing of her name back upon the rolls of the Colville Confederated Tribe, and that her name be placed thereon retroactively as of the year 1952.

2. That the Court order and direct that said Plaintiff receive full back per capita payments, and any and all other payments that have been made to members of the

Colville Confederated Tribe, since the year of 1952 to the date of Judgment of this Court, and that the Colville Confederated Tribe and the Colville Business Council be ordered to adopt the necessary resolution for the payment of said amounts, and if such cannot be done, then, in the alternative, that the Plaintiff have judgment against the Colville Confederated Tribe and the Colville Business Council and the Enrollment Committee of the Colville Confederated Tribe, and the specific members of the Colville Confederated Tribe, for the amount of said back per capita pay and any and all other payments made to the members of the Colville Confederated Tribe since the year of 1952, plus interest on said amount at the rate of eight (8%) per cent per annum from the time said amounts became due and payable to the date of Judgment.

3. That the Court decree that the Plaintiff have judgment against the Defendants for attorney fees in the sum of $5,000.00, plus Plaintiff's court costs herein.

4. For such other and further relief as to the Court may seem just, equitable and proper.

s/ KELLY HANCOCK
Attorney for Plaintiff
Box H, Omak, Washington 98841

STATE OF WASHINGTON }
County of Okanogan } ss.

ALICE M. THOMPSON, being first duly sworn, on oath, deposes and says: That she is the Plaintiff named in the above entitled action; that she has read the foregoing Complaint, knows the contents thereof and believes the same to be true.

s/ ALICE M. THOMPSON

Subscribed and sworn to before me this 9th day of August, 1971.

[SEAL]

s/ KELLY HANCOCK
Notary Public in and for the State of Washington, residing at Omak.

LARAMIE COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

JUNE KAREN LARAMIE, PATRICIA MAE LARAMIE and CONNIE SUE LARAMIE, by and through their Guardians Ad Litem, EVELYN A. LARAMIE, and TYRONE W. LARAMIE, *Plaintiffs,* v. NARCISSE NICHOLSON, JR., MARY NICHOLSON, THELMA MARCHAND, GEORGE SNIDER, ALICE LAWRENCE, ROY SEYLOR, DEAN DOURGEAU, PAT NUGENT, BARNEY RICKARD, OLIVER POOLER, SHIRLEY PALMER, JIMMY ORR, LUCY COVINGTON, and VIRGINIA ANDREWS, as members of the COLVILLE BUSINESS COUNCIL of THE COLVILLE CONFEDERATED TRIBE, and THE COLVILLE CONFEDERATED TRIBE, *Defendants.*	No. 3402 COMPLAINT

Come now the Plaintiffs above named and by and through their Guardians Ad Litem alleges and show the Court as follows:

I.

That Tyrone W. Laramie and Evelyn A. Laramie are the duly appointed, qualified and acting Guardians Ad Litem of June Karen Laramie, Patricia May Laramie and Connie Sue Laramie, the above named minors.

II.

That at all times herein mentioned the Defendants Narcisse Nicholson, Jr., Mary Nicholson, Thelma Marchand, George Snider, Alice Lawrence, Roy Seylor, Dean Dougeau, Pat Nugent, Barney Rickard, Oliver Pooler, Shirley

Palmer, Lucy Covington, Jimmy Orr and Virginia Andrews were members of the Colville Business Council of the Colville Confederated Tribes.

That at all times herein mentioned the Colville Business Council, acting on behalf of the Colville Confederated Tribes, acted on the application of the three minor Plaintiffs for tribal membership.

That at all times herein mentioned the Colville Business Counsil was composed of members of the Colville Confederated Tribes, with their principal place of business at Nespelem, Washington, and Grand Coulee, Washington.

III.

That the said three minor Plaintiffs did apply to the Colville Business Council to be adopted as members of the Colville Confederated Tribes.

IV.

That the said Colville Business Council and/or the Enrollment Committee thereof advised the parents of said minors that there were certain requirements that they had to meet and certain evidence that they had to show, to wit: That they were citizens of the United States, that they had the proper degree of Indian blood to be admitted to the Colville Confederated Tribe, that they were not members of any other tribe, and other requirements alleged to be required by the Colville Confederated Tribes for enrollment, which requirements had been set up by the Business Council of the Colville Confederated Tribes.

That all of said requirements were met by the Plaintiffs.

That at the time of the last hearing, the Enrollment Committee contended that a Resolution had been passed by the Colville Business Council that prohibited the minors from being adopted as members of the Colville Confederated Tribe, due to the fact that they and/or their parents had been enrolled in a Canadian tribe, and even though they had been disenfranchised therefrom, disbarred them from becoming adopted. It was stipulated by the Business Council, however, that if this did not bar them, then their application for enrollment would be accepted.

It was stipulated at the hearing that an opinion would be requested by the Enrollment Committee and/or the Colville Business Council from the Department of the Interior, Bureau of Indian Affairs, Washington, D. C., and that an opinion would be requested by the attorney representing the said Plaintiffs.

That the said opinion was requested both by the Colville Confederated Tribes through their respective business council, and by the attorney for the Plaintiffs. That it was ruled by the Bureau of Indian Affairs of the Department of Interior, through the Commissioner of Indian Affairs that the fact that said Plaintiffs and/or their parents, had been enrolled before in a tribe in Canada did not, under the resolution, disqualify them, since they had been disenfranchised from that tribe. However, even though such ruling was made, the said Colville Business Council and the Colville Enrollment Committee then refused to grant any further hearing on said adoption petitions by the Plaintiffs, and refused to take any further action to adopt said Plaintiffs into the membership of the Colville Confederated Tribes.

V.

That the said actions of the Colville Confederated Tribe by and through the Colville Business Council, and by and through the Enrollment Committee of the Colville Business Council was an action on behalf of said tribe and governing bodies thereof, and that said tenants *discriminated against the said three minor Plaintiffs,* herein, even though said Plaintiffs met all of the requirements required of them, even though two of the Plaintiffs went to the extent of securing the necessary papers to show that they were United States citizens, and that the said Colville Confederated Tribe, acting through their respective defendant governing body, improperly, without authority, *did discriminate against the said Plaintiffs* contrary to the laws of the United States, being USCA "Sections 1981 and all pertinent sections under the Civil Rights Act under Title 42, and the United States Constitution and all pertinent sections thereto."

That many other individuals have been adopted into the Colville Confederated Tribe without having to show all of

the facts that these Plaintiffs have had to show, and that many individuals have been adopted who had some of the disqualifications that these Plaintiffs had to show did not exist, and that the said tribal council has *discriminated against these Plaintiffs contrary to law,* because they required more of them than other individuals who have been adopted into the Tribe, and that they have been *further discriminated against* because even after these requirements had been *met, the applications of Plaintiffs were still refused.*

VI.

That a Federal question is involved. That the U. S. District Court has jurisdiction of said matter.

That being adopted as members of the Colville Confederated Tribes by said respective Plaintiffs wolud mean that they would have an interest in the assets of the Colville Confederated Tribes, and that they would receive benefits from the Colville Confederated Tribe in the future.

That certain benefits have been paid to the members of the Colville Confederated Tribe, through per capita and otherwise, for a number of years, and that the Plaintiffs are entitled to have these benefits paid to them from the date that their application was made to the date of the hearing on this Complaint, as such benefits are earned benefits which Plaintiffs are entitled to; that the exact amount of such benefits are unknown to the Plaintiffs, but will be alleged and testified to at the time of trial.

VII.

That said Plaintiffs should be allowed a reasonable attorney's fee against the Defendants for the bringing of this action; that a reasonable attorney's fee would be $2,500.00, plus Court costs herein.

VIII.

That the Plaintiffs have no other adequate remedy at law.

WHEREFORE, Plaintiffs pray for Judgment as follows:

1. That the Court decree that the Defendants have improperly acted upon the applications for adoptions on be-

half of said minor Plaintiffs, and decree and order that the Colville Business Council of the Colville Confederated Tribe pass the necessary resolution to approve the applications for the petitions for adoption by said three minor Plaintiffs, and that the said Plaintiffs be adopted as members of the Colville Confederated Tribe and placed on the rolls thereof effective as of the dates of their applications.

2. That the Court order that said three minor Plaintiffs receive full back per capita payments that have been made during the time interval since they made application to the date of this decree.

3. That the Court decree that Plaintiffs have Judgment against the Defendants for attorney fees in the sum of $2,500.00, plus the Plaintiff's Court costs herein.

4. That the Court decree and award such other and further relief as to the Court seems just and proper.

HANCOCK & KOHLS,
Box H, Omak, Washington 98841
s/KELLY HANCOCK
Attorneys for Plaintiffs

State of Washington }
County of Stevens } ss.

TYRONE W. LARAMIE and EVELYN A. LARAMIE, husband and wife, being first duly sworn, on oath, deposes and says: That she is the Plaintiff above named and the duly appointed, qualified and acting Guardian Ad Litem of June Karen Laramie, Patricia May Laramie and Connie Sue Laramie, Minors; that she has read the foregoing Complaint, knows the contents thereof and believes the same to be true.

s/ TYRONE W. LARAMIE
s/ EVELYN A. LARAMIE

Subscribed and sworn to before me this 26th day of June, 1970.

s/ [SIGNATURE]

Notary Public in and for the State of Washington, residing at Colville, Wash.

SUPREME COURT, U. S.

FILED

APR 1 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1281

MEL TONASKET, et al.,
Petitioners,

v.

ALICE M. THOMPSON,
Respondent.

NARCISSE NICHOLSON, JR., et al.,
Petitioners,

v.

JUNE KAREN LARAMIE, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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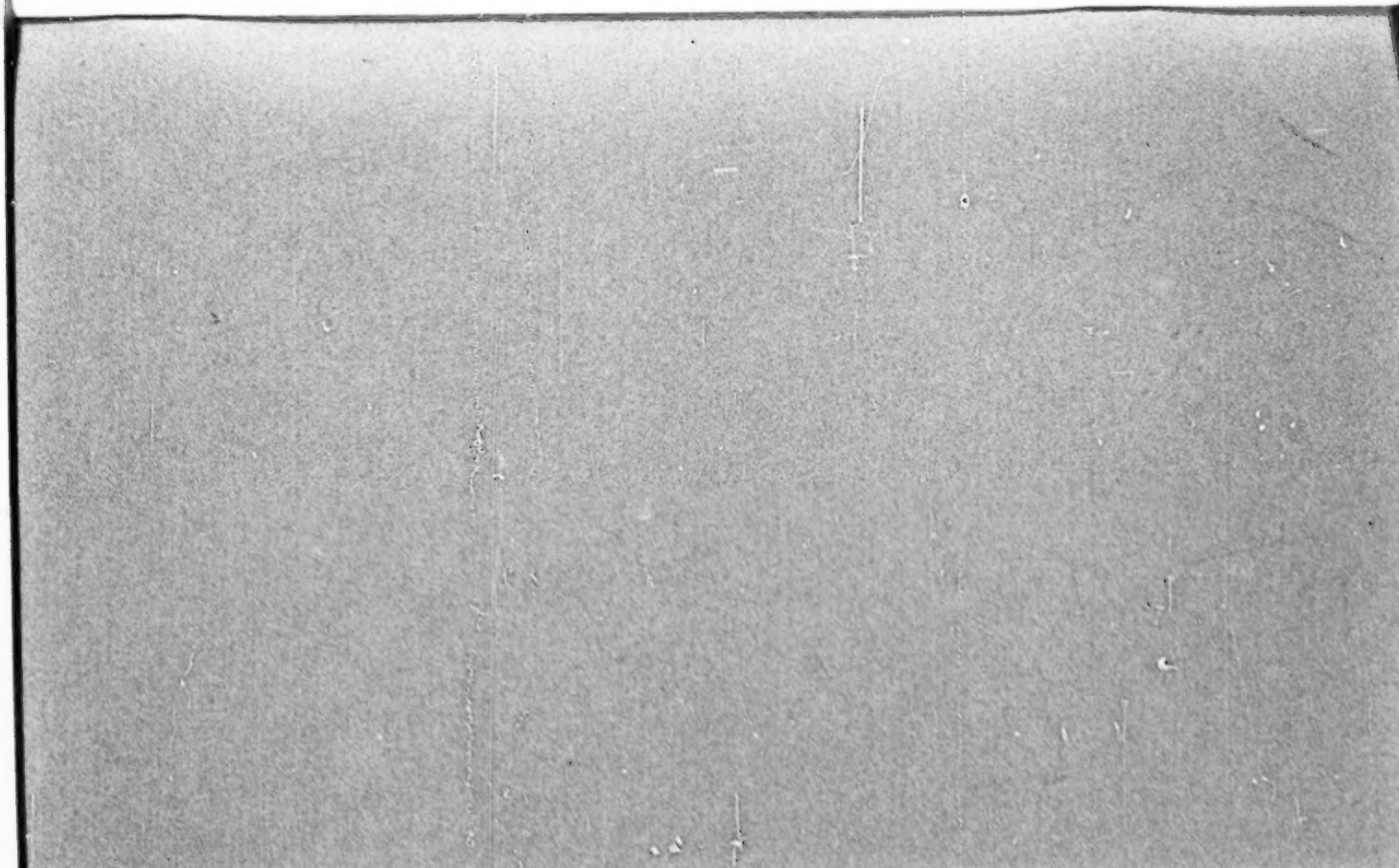

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IN THE

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OCTOBER TERM, 1973

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MEL TONASKET, et al.,
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ALICE M. THOMPSON,
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BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinions of the Ninth Circuit Court of Appeals are reported as *Thompson v. Tonasket*, 487 F.2d 316 (9th Cir. 1973), and *Laramie v. Nicholson*, 487 F.2d 315 (9th Cir. 1973).

JURISDICTION

The jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The sole question presented by the Petitioner is, whether federal courts have jurisdiction to decide cases arising under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03; where it is alleged that a plaintiff has been denied equal protection of Tribal Law or has been deprived of property without due process of its law?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03.

28 U.S.C. § 1343(4).

Rule 19 of the Rules of the United States Supreme Court.

Article VII of the Constitution and By-Laws of the Confederated Tribes of the Colville Indian Reservation, Washington.

Resolution 1967-186 of the Colville Business Council.

Resolution 1969-349 of the Colville Business Council.

STATEMENT OF THE CASE

1. The *Thompson* Case

Mrs. Thompson, plaintiff in the district court, was born August 25, 1911, in Okanogan County, Washington, as an American citizen. She has always retained her rights as an American citizen, and she is married to an American citi-

zen. She is 5/8 degree Colville Indian blood. Plaintiff has consistently kept up her contact with the Colville Confederated Tribes, and is not a member of any other Indian tribe. Her great uncle was Chief Nespelem George, chief of the Colville Tribe and San Poil Tribes, and Chief Jim James, who was the chief of the Colville Tribes, was also known to her as her uncle. (Tr. 3, 51, 52)

Mrs. Thompson was enrolled in the Colville Indian Tribe on November 2, 1911, and given an allotment on the Colville Reservation. She remained enrolled on the Colville rolls from the time she was placed thereon up to 1952, when her name was improperly stricken from the rolls by the governing body of the Colville Confederated Tribes. (Tr. 2, 52) In 1952, the Tribe ceased to pay her the annual per capita payments due her, and in 1958, she received her Patent in Fee to her allotment. (Tr. 2)

At one time, when she was residing in Canada, she voted in a Provincial election for a candidate. She was not registered as a Canadian citizen to vote, and she did not at any time register to vote in this election. (Tr. 50) Her name was stricken from the Colville rolls because she had voted in a foreign election, and by so doing, had lost her American citizenship. It was the contention that her citizenship was lost under 8 U.S.C. § 1481(a)(5) and under the ruling of *Perez v. Brownell*, 356 U.S. 44 (1958), holding that the last quoted section of the law was constitutional. This section of the law was declared unconstitutional, in the case of *Afroyim v. Rusk*, 387 U.S. 253 (1967), and the *Brownell* case was overruled. She thereafter petitioned the Colville Business Council to be reenrolled as a member of the Colville Tribe. Mrs. Thompson contended that the Enrollment Committee, in disenrolling her, did not

have the authority to determine that she, as a tribal member, would lose her nationality by voting in a foreign election. She further contended they did not have the authority to declare that she had lost her citizenship, and thereby lost her right to remain a member of the Colville Tribe, because she had voted in a foreign election.

Her petition was based upon the *Afroyim* case in 1967, declaring 8 U.S.C. § 1481(a)(5) unconstitutional. (Tr. 3, 4) Mrs. Thompson made repeated requests for reenrollment. but the Colville Enrollment Committee and Business Council refused to reenroll her or take any action on her request. She met all of the requirements for membership in the Colville Confederated Tribes at all times.

The complaint alleged, among other things, that the action of the governing body of the tribe was arbitrary, capricious, and discriminatory and that Mrs. Thompson had been denied equal protection of its law and deprived of her property without due process of law under the Indian Bill of Rights, 25 U.S.C. § 1302(8).

Mrs. Thompson prayed in her complaint to be reinstated and reenrolled as a member of the Tribe, and that her name be placed retroactively upon the rolls, effective as of the date of her disenrollment in 1952. Mrs. Thompson asked that she receive the back per capita payments that had been improperly withheld from her, plus interest thereon and a reasonable attorney's fee. (Tr. 6, 7)

Defendants attacked the jurisdiction of the court, and argument was held on the matter. The court entered an order dismissing Mrs. Thompson's complaint for lack of subject matter jurisdiction. (Tr. 54, 55)

On December 17, 1971, Mrs. Thompson filed a Notice of Appeal to the Ninth Circuit Court of Appeals and on November 2, 1973, the Ninth Circuit Court of Appeals entered judgment reversing the dismissal and remanding the case to the district court for further proceedings.

The merits of Mrs. Thompson's claim are not before this court. Rather, the issue is whether, under the Indian Bill of Rights, 25 U.S.C. § 1302, and 28 U.S.C. 1343(4), the district court has jurisdiction to hear her claim.

2. The *Laramie* Case

The Laramie children, plaintiffs in the district court, were all minors when this action began. Patricia Mae Laramie was born May 23, 1956; Constance Susan Laramie was born January 7, 1958; and June Karen Laramie was born September 11, 1954. They are all United States citizens and are also half-blooded Colville Indians. On January 22, 1968, a written application was made on their behalf to the Colville Business Council for their enrollment in the Colville Confederated Tribe as members. Their mother, Evelyn A. Laramie, is a member of the tribe. Mrs. Laramie was advised that before the minors could be enrolled, they had to meet certain requirements. These requirements were: (1) That they be citizens of the United States; (2) That they have one-quarter Indian blood; (3) That they not be members of any other tribe; (4) That they had not been members of any other tribe.

The minors met the first three requirements. There are a number of disputes on the merits as to: whether factually, they met the fourth requirement; whether the fourth requirement actually existed at the time of their application; whether, by reason of an arrangement with the Bureau of

Indian Affairs, a decision by the Commissioner of Indian Affairs would be final and binding on both parties (the dispute was submitted to the Commissioner, who did rule for the children; his decision was, however, ignored by the Enrollment Committee and Business Council); and finally, whether, the fourth requirement has been applied in a discriminatory fashion to these children, in that in the case of other individuals similarly situated, the fourth requirement was not invoked to deny them membership in the tribe. This last claim is based on, among other things, the equal protection and due process clauses of the Indian Bill of Rights, 25 U.S.C. § 1302(8).

None of these questions is before this Court. The issue is, rather, whether the district court, under the Indian Bill of Rights, 25 U.S.C. § 1302, and 28 U.S.C. § 1343(4), has jurisdiction to hear these claims.

The Laramie children brought this action on July 22, 1970. On January 18, 1972, the district court dismissed the complaint for lack of subject matter jurisdiction. On January 24, 1972, the children filed a Notice of Appeal to the Ninth Circuit Court of Appeals and on October 9, 1973, the Ninth Circuit Court of Appeals entered judgment reversing the dismissal and remanding the case to the district court for further proceedings.

REASONS WRITS SHOULD BE DENIED

1. Under Rule 19 of the Rules of the United States Supreme Court, There Is No Good Reason Now to Grant a Writ of Certiorari on This Issue, Since All Final Lower Court Cases to Date Have Been Unanimous in Accepting Jurisdiction, and There Is No Pressing Need to Settle the Question

Every Circuit Court of Appeals that has faced the instant question has found in favor of jurisdiction and against tribal sovereign immunity. No unreversed district court decision has been reported to the contrary. *See Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971); *Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (10th Cir. 1971) [The Tenth Circuit cannot be said to have *held* that federal courts have jurisdiction over Indian Bill of Rights claims, but, while specifically avoiding the issue in *Slattery*, the court indicated by its language; its citation of a Harvard note cited below; and the general tone of its opinion that it felt that there probably was jurisdiction. 453 F.2d at 281. Further, a district court in the Tenth Circuit has held that federal courts have jurisdiction, under 28 U.S.C. § 1343(4), to enforce the provisions of the Indian Bill of Rights. *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973).]; *Luxon v. Rosebud Sioux Tribe of South Dakota*, 455 F.2d 698 (8th Cir. 1972); *White Eagle v. One Feather*, 478 F.2d 1311 (8th Cir. 1973); *Johnson v. Lower Elwha Tribal Community of Lower Elwha Indian Reservation*, 484 F.2d 200 (9th Cir. 1973); and *Seneca Constitutional Rights Organization v. George*, 348 F. Supp. 48 (W.D. N.Y. 1972).

Under Rule 19 of the Rules of the United States Supreme Court, the only possible consideration for granting certiorari in this case is that,

> a court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this Court.

The operative words are "should be." Presumably the criterion of that "should be" is that the law is unclear and should be clarified speedily, without waiting for a split in

the circuit courts of appeal. But here, the law is clear. At least four different courts—three courts of appeal and one district court—have rendered final decisions on the issue, and these decisions have been unanimous. There is no need at this time for a Supreme Court decision on the issue.

2. If Federal Courts Are Deemed to Lack Jurisdiction, Then Enforcement of the Statute Will be Left in the Hands of Those Whom It Was Passed to Restrain

The Indian Bill of Rights provides:

> No Indian tribe in exercising powers of self-government shall—
>
> * * *
>
> (8) deny to any person within its jurisdiction the equal protection of the laws or deprive any person of liberty or property without due process of law.
>
> 25 U.S.C. § 1302.

The act was passed to prevent Indian tribes from depriving Indians of certain fundamental rights. It would not have been passed if Congress felt that Indian tribes were not violating these rights.

Petitioners' argument is that Congress meant to give virtually exclusive jurisdiction to those Indian tribal courts and councils which were, in fact, the object of the legislation. Neglected, is the basis of the statute which was to prevent such courts and councils from violating certain basic rights. Petitioners' interpretation of the statute would make the rights it guarantees mere paper rights, dependent on the good faith and respect for law of those very authorities Congress has found too often lacking in that respect. *See Loncassion v. Leekity*, 334 F. Supp. 370, 373 (D. N.M. 1971); *McCurdy v. Steele*, 353 F. Supp. 629, 635 (D. Utah 1973); *Luxon v. Rosebud Sioux Tribe of South*

Dakota, 455 F.2d 698, 700 (8th Cir. 1972); *Johnson v. Lower Elwha Tribal Community of the Lower Elwha Indian Reservation*, 484 F.2d 200, 203 (9th Cir. 1973). Federal courts must have jurisdiction here, if the will of Congress in restraining the excesses of tribal courts and councils is to be respected and given effect.

An influential commentary on the Indian Bill of Rights notes:

> The Indian Bill of Rights contains the following provision: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." No other remedy for enforcing the rights guaranteed by the statute is mentioned. The question arises whether this is the only remedy to enforce the statutory restrictions on tribal governments.
>
> The Senate committee expressed no intention to limit remedies to habeas corpus. Rather, provision of the writ resulted from the special concern that there be means of assuring that the statute's procedural rights were effectively guaranteed to criminal defendants. The committee did not want to abolish tribal courts; a regular appeal would be ineffectual because there would not be an adequate trial record. The first proposal to deal with this problem, S. 962, guaranteed the right to appeal to the federal district courts for a de novo trial with the right to a jury. This was changed into the habeas corpus guarantee, which accomplished effectively the same protection of procedural rights. Also the Senate committee, in its report listing habeas corpus amidst the other guarantees, seems to have regarded habeas corpus not simply as a remedy but also as a right. For these two reasons, the provision for habeas corpus should not be taken as implying that other remedies were intended not to be available.
>
> If no remedy other than habeas corpus were available, a large portion of the rights guaranteed by the

> statute—all those which might be infringed without "detention by order of an Indian tribe"—would be unprotected and therefore ineffectual. For instance, exclusion of members from the reservation or revocation of tribal membership rights, discriminatory allocation of communal resources, prevention of religious practices on the reservation and the taking of private property for public use without just compensation would be infringements of rights declared by the statute that would receive little or no protection from the habeas corpus provision. Lack of other remedies would clearly defeat congressional purpose. The federal courts, in situations similar to this, have implied the appropriate remedies in order to effectuate the purposes of Congress.

Note, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 Harv. L. Rev. 1343, 1371-72 (1968) (footnotes omitted). The note concludes that jurisdiction to enforce the statute can be found in 28 U.S.C. § 1343(4), which provides jurisdiction for "relief under any Act of Congress providing for the protection of civil rights." All courts which have rendered final decisions on the issue of jurisdiction have similarly held.

3. The Doctrine of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), Holds That 28 U.S.C. § 1343(4), Gives Jurisdiction to a Federal Court to Hear Civil Rights Cases Even Where the Statute Providing the Civil Right Does Not Explicitly Grant Jurisdiction to Federal Courts

This issue is ruled by *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *See Dodge v. Nakai*, 298 F. Supp. 17, 25 (D. Ariz. 1968); *McCurdy v. Steele*, 353 F. Supp. 629, 635-36 (D. Utah 1973), which have so held. In *Jones*, a Negro who had been deprived of the right to buy private

property, by the act of a private individual, was given the right to enforce the provisions of 42 U.S.C. § 1982.

The court noted, in footnote 1 of the opinion, that jurisdiction was based upon 28 U.S.C. § 1343(4). The court further stated:

> The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy.
>
> 392 U.S. 409, n. 13.

Jones is quite similar to the instant case. Jurisdiction to enforce § 1982 was not explicitly given to federal courts, and so it had to be based on § 1343(4). Jurisdiction could have been limited to state courts, but § 1982, like the other Reconstruction civil rights acts, was aimed at correcting and curbing abuses of and by state institutions. To leave sole jurisdiction to administer § 1982 in the hands of the state courts would have been to gut the act. Similarly, to leave the administration of the Indian Bill of Rights solely in the hands of Indian councils and courts is to gut the act.

Other cases implying remedies in similar situations are *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967) (violation of section 15 of the Rivers and Harbors Act of 1899); and *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) (violation of section 14(a) of the Securities Exchange Act of 1934).

The Indian Bill of Rights is a "civil rights" statute. No explicit jurisdictional provision is established. On the authority of *Jones*, however, federal courts would have jurisdiction under § 1343(4).

4. Congress Specifically Did Mean to Curtail the Sovereign Immunity of Indian Tribal Authorities When That Sovereign Immunity Clashed With Certain Fundamental Human Rights

The sovereign immunity of Indian tribes is curtailed by the statute. It was meant to be curtailed by the statute. Congress felt that the loss of certain very fundamental rights was too high a price for the individual Indian to pay for his tribe's sovereign immunity.

Puzzlement may be given as to what rights are lost by allowing federal jurisdiction. What "rights" are taken away by this statute? To what extent is Indian self-realization and cultural autonomy undermined? The only "right" lost is a right to deny individual Indians equal protection, or due process of law, or a jury in certain cases, or a limited right of free speech, among other rights. The statute merely guarantees certain fundamental civil liberties. It is hardly a gross abridgment of Indian rights to self-realization, but is instead a guarantee that the Indian shall share, not in fundamental Anglo-American liberties, but in what Congress has deemed to be rights fundamental to any civilization to be humane and just. The statute,

> appears to have been tailored by Congress to the purpose of enhancing the civil liberties of individual Indians without unduly undermining Indian self-government and cultural autonomy.

McCurdy v. Steele, supra, 353 F. Supp. at 632. *See also* Note, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 Harv. L. Rev. 1343, 1359-60 (1968).

Finally, the language of the statute itself indicates a specific Congressional intent to limit the remaining sovereignty of Indian governments: "No Indian tribe in exercising powers of self-government shall . . . " abridge the listed rights. No more definite language could be demanded. *See Johnson v. Lower Elwha Tribal Community of the Lower Elwha Indian Reservation*, 484 F.2d 200, 202 (9th Cir. 1973).

5. The Explicit Grant of Habeas Corpus Jurisdiction in 25 U.S.C. § 1303 Was Not Meant to, by Implication, Deny Jurisdiction in Non-criminal Cases but Rather Was Meant Only to Remedy a Defect in the General Habeas Corpus Statute, 28 U.S.C. §§ 2241(c)(1)-(5)

The reason for the explicit grant of habeas corpus jurisdiction was not to deny jurisdiction over the non-criminal rights given by the statute, but rather to overcome the explicit wording of the habeas corpus statute, 28 U.S.C. §§ 2241(c)(1)-(5), which clearly denied jurisdiction over tribal councils and courts. *See Solomon v. La Rose*, 335 F. Supp. 715, 721 (D. Neb. 1971); *McCurdy v. Steele*, 353 F. Supp. at 635.

CONCLUSION

For the reasons stated above, respondents respectfully request that Writs of Certiorari not issue, and that the judgments of the United States Court of Appeals for the Ninth Circuit in *Thompson v. Tonasket*, 487 F.2d 316 (9th Cir. 1973), *Laramie v. Nicholson*, 487 F.2d 315 (9th Cir. 1973), be left undisturbed, or be summarily affirmed.

Respectfully submitted,

KELLY HANCOCK, P.S.
Attorney for Respondents

March 28, 1974

APPENDIX A

OPINIONS BELOW

THOMPSON v. TONASKET

ALICE M. THOMPSON,
Plaintiff-Appellant,

v.

MEL TONASKET et al., as members of the Colville Business Council of The Colville Confederated Tribe, and The Colville Confederated Tribe,
Defendants-Appellees.

No. 72-1193

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

November 2, 1973

PER CURIAM:

This case presents the same jurisdictional question as was presented in the case of Laramie V. Nicholson, 9 Cir., 1973, 487 F.2d 315. As in that case, the trial judge held that he had no jurisdiction and dismissed the action. The judgment is reversed on the authority of Laramie v. Nicholson, *supra*, and of Johnson v. The Lower Elwha Tribal Community, 9 Cir., 1973, 484 F.2d 200.

As in the Laramie case, we express no opinion on the merits of the case because the trial court did not reach that question. The judgment is reversed and the case is remanded for further proceedings.

LARAMIE v. NICHOLSON

JUNE KAREN LARAMIE et al.,
Plaintiffs-Appellants,
v.
NARCISSE NICHOLSON, JR., et al.,
Defendants-Appellees.

No. 72-1264

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

October 9, 1973

DUNIWAY, Circuit Judge:

The appealing plaintiffs are children whose mother is a member of the Colville Confederated Tribe of Indians. They seek to be enrolled as members of the tribe. The trial judge dismissed their action for want of jurisdiction, relying on our decision in Fondahn v. Native Village of Tyonek, 9 Cir. 1971, 450 F.2d 520. We reversed and remand.

Although plaintiffs met all other requirements for enrollment in the tribe, they were refused enrollment by the Business Council of the tribe because they had previously been enrolled members of another tribe. Council Resolution 1967-186, Section 4 provided:

> "If the applicant is already a duly enrolled member of another recognized tribe, this will deem the applicant automatically ineligible for adoption in the Colville Confederated Tribes, regardless of whether the applicant offers to relinquish his or her rights with the other tribe.

This requirement was amended in 1969, by Resolution 1969-349, adopted after the action by the Council in the present case, to disqualify also those who had in the past been members of another tribe.

Plaintiffs allege that the Colville Business Council agreed to enroll them if the Commissioner of Indian Affairs of the Department of the Interior ruled that this was not prohibited by Resolution 1967-186. They say that the Commissioner so ruled, but that the Council still refused to take further action, even though other individuals having the same supposed disqualification were enrolled in the tribe. This is the factual basis for plaintiffs' claim of a denial of the equal protection of tribal law.

Plaintiffs claim that violation of the so-called Indian Bill of Rights, 25 U.S.C. §§ 1301-1303, enacted in 1968 (82 Stat. 77), gives rise to a civil action and that 28 U.S.C. § 1343(4) convers jurisdiction on the District Court. We agree. We have recently so held. Johnson v. Lower Elwha Tribal Community, 9 Cir. 1973, 484 F.2d 200 (1973).

In that case, the claim was that the plaintiff had been deprived of due process of law in violation of 25 U.S.C. § 1302(8). In this case, the claim is that the plaintiffs have been deprived of the same section. We see no difference in principle that distinguishes our *Johnson* case from this case.

Our decision in *Fondahn, supra,* is not to the contrary. It is true that the case was decided in 1971, more than three years after the enactment of the Indian Bill of Rights on April 11, 1968. But it is also true that the statute was not brought to our attention, and we did not even purport to decide what its effect upon jurisdiction might be. Instead, we followed pre 1968 law, adopting and applying the reasoning of the Tenth Circuit in Martinez v. Southern Ute Tribe, 10 Cir., 1957, 249 F.2d 915. The Tenth Circuit has indicated that Martinez may no longer be good law.

In Slattery v. Arapahoe Tribal Council, 10 Cir., 1971, 453 F.2d 278, 281, the Tenth Circuit, in dictum, and after citing Martinez, said:

> "It may well be that tribal enrollment practices are now subject to the statutory requirements of equal protection and due process as provided in 25 U.S.C. § 1302(8). See the Indian Bill of Rights and the Constitutional Statute (sic) of Tribal Government, 82 Harv.L.Rev. 1343 [1372-73] (1969). However, the existence of such restraint and the extent thereof need not here be decided." 453 F.2d at 281.

The case was decided on the ground that no violation of the statute was shown. We conclude that *Fondahn, supra,* does not control this case.

We do not consider the merits of the plaintiffs' claim; that is a matter for the district court in the first instance. We only hold that the court did have jurisdiction under 28 U.S.C. § 1343(4) and 25 U.S.C. § 1302(8).

The judgment is reversed and the case is remanded for further proceedings.

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

UNITED STATES CONSTITUTIONAL PROVISION:

UNITED STATES CONSTITUTION, ART. 1 § 8, cl. 2

The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;

UNITED STATES STATUTES:

25 U.S.C. §§ 1301-03.

§ 1301. Definitions.

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense. (Pub. L. 90-284, title II, § 201, Apr. 11, 1968, 82 Stat. 77.)

§ 1302. Constitutional rights.

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of

the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witness against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(Pub. L. 90-284, title II, § 202, Apr. 11, 1968, 82 Stat. 77.)

§ 1303. Habeas corpus.

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe. (Pub. L. 90-284, title II, § 203, Apr. 11, 1968, 82 Stat. 78.)

28 U.S.C. § 1343(4).

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(4) to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. As amended Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

RULES OF COURT

Rule 19 of the Rules of the United States Supreme Court.

Considerations governing Review on Certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question

of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

TRIBAL CONSTITUTIONAL PROVISIONS

ARTICLE VII OF THE CONSTITUTION AND BY-LAWS OF THE COLVILLE CONFEDERATED TRIBES

ARTICLE V, MEMBERSHIP OF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION.

—There shall be added a new provision governing membership of the Confederated Tribes of the Colville Reservation which shall read as follows:

Section 1.—The membership of the Confederated Tribes of the Colville Reservation shall consist of the following:

(a) All persons of Indian blood whose names appear as members of the Confederated Tribes on the official census of the Indians of the Colville Reservation as of January 1, 1937, provided that, subject to the approval of the Secretary of the Interior corrections may be made in said roll within two years from the adoption and approval of this amendment.

(b) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining a permanent residence on the Colville Indian Reservation.

(c) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining residence elsewhere in the continental United States, provided that the parent or guardian of the child indicate a willingness to maintain tribal relations and to participate in tribal affairs. To indicate such willingness to maintain tribal affiliation, the parent or guardian shall, within six months after the birth of the child submit a written application to have the child enrolled. The application shall be accompanied by the child's birth certificate together with any other evidence as to the eligibility of the child for enrollment in the Confederated Tribes of the Colville Reservation. If the certificate and application are not filed within the designated time, the child will not be enrolled.

Section 2. The Business Council of the Confederated Tribes shall have power to prescribe rules and regulations governing future membership in the tribes, including the adoption of members and loss of membership, provided:

(a) That such rules and regulations shall be subject to the approval of the Secretary of the Interior.

(b) That no person shall be adopted who possesses less than one-fourth degree Indian blood.

(c) That any member who takes up permanent residence or is enrolled with a tribe, band or community of foreign Indians shall lose his membership in the Colville Tribes.

Alien Indians may be deleted from the rolls after they have been given an opportunity to be heard in their own behalf. The tribe shall also take appropriate action to correct the existing tribal roll and, if necessary, delete from the rolls alien Indians whose names appear on the rolls of the Confederated Tribes and who have abandoned tribal relations. The Colville Confederated Tribes shall not deprive anyone of vested property rights, such as allotments or inherited interests. (*Adopted by Confederated Tribes May 20, 1949. Approved by Commissioner of Indian Affairs April 14, 1950.*)

Section 3. After July 1, 1959, no person shall be admitted to membership in the Confederated Tribes of the Colville Reservation unless such person possesses at least one-fourth (¼) degree blood of the tribes which constitute the Confederated Tribes of the Colville Reservation. (*Adopted by the Colville Confederated Tribes on May 9, 1959. Approved by the Acting Commissioner of Indian Affairs July 2, 1959.*)

TRIBAL RESOLUTIONS

RESOLUTION NO. 1967-186

BE IT HEREBY RESOLVED, by the Colville Business Council, governing body of the Confederated Tribes of the Colville Reservation, meeting in Special Session at the Colville Indian Sub-Agency, Nespelem, Washington, acting for and on behalf of the Colville Confederated Tribes this 2nd day of June, 1967, that Colville Resolution No. 1966-393 is hereby rescinded in its entirety and the following rules for membership, by adoption, in the Colville Confederated Tribes are hereby established:

Section 1—Applicants must be citizens of the United States and subscribe to the Constitution thereof and to the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation.

Section 2—Applicants must possess at least one-fourth (¼) degree of Indian blood of the tribes which constitute the Confederated Tribes of the Colville Reservation, and such blood must be computed from documentary evidence obtained from sources acceptable and recognized by the Colville Business Council and consistent with the January 1, 1937 Basic Membership Roll.

Section 3—At least one of the applicant's parents must be a duly enrolled member of the Confederated Tribes of the Colville Reservation.

Section 4—If the applicant is already a duly enrolled member of another recognized tribe, this will deem the applicant automatically ineligible for adoption in the Colville Confederated Tribes, regardless of whether the applicant offers to relinquish his or her rights with the other tribe.

Section 5—Applicants must possess good character and otherwise be acceptable to the Business Council as a tribal member. Applicants must state under oath that he or she has not been convicted of any offense involving dishonesty during the preceding five years.

RESOLVED FURTHER, that the Secretary of the Interior, or his duly authorized representative, is hereby requested to give top priority in reviewing this resolution so that the authority to approve tribal adoption cases will again be delegated to the Colville Business Council, thereby preventing any undue delay in the processing of tribal adoption cases.

The foregoing was duly enacted by the Colville Business Council by a vote of 6 FOR and 4 AGAINST, under authority contained in Article V, Section 1(a) of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938 and approved by the Commissioner of Indian Affairs on April 19, 1938; and under further authority contained in Article VII, Section 2 of the Constitution and By-Laws, adopted by the Confederated Tribes on May 20, 1949 and approved by the Commissioner of Indian Affairs on April 14, 1950.

ATTEST:

Narcisse Nicholson, Jr.

.....

Narcisse Nicholson, Jr., Chairman
Colville Business Council

RESOLUTION NO. 1969-349

WHEREAS, by enactment of Resolution 1967-186, dated June 2, 1967, the Business Council established rules for membership by adoption; and

WHEREAS, the above cited resolution was approved by the Deputy Assistant Commissioner of Indian Affairs on August 2, 1967; and

WHEREAS, Section 4 and 5, of Resolution 1967-186 are not clear as to their meaning; and

WHEREAS, it is the recommendation of the Enrollment Committee to amend Sections 4 and 5 of Resolution 1967-186.

NOW, THEREFORE, IT IS HEREBY RESOLVED, that we, the Colville Business Council, meeting in Special Session at the Colville Indian Sub-Agency, Nespelem, Washington, acting for and on behalf of the Colville Confederated Tribes this 22nd day of September, 1969, do hereby approve the recommendation of the Enrollment Committee. Sections 4 and 5 shall be amended to read as follows:

> "Section 4—If the applicant is already a duly enrolled member, or has in the past been a duly enrolled member of another recognized Indian tribe, this will deem the applicant ineligible for adoption in the Colville Confederated Tribes, regardless of whether the applicant offers to relinquish, or has relinquished, his or her rights with the other tribe."
>
> "Section 5—Applicants must possess good character and otherwise be acceptable to the Business Council at a tribal member. Applicants, excluding minors, must state under oath that he or she has not been convicted of any offense involving dishonesty during the preceding five years."

RESOLVED FURTHER, that the Secretary of the Interior, or his duly authorized representative, is hereby requested to give top priority in reviewing the amendment to Resolution 1967-186.

The foregoing was duly enacted by the Colville Business Council by a vote of 11 FOR and 0 AGAINST, under authority contained in Article V, Section 1(a) of the Con-

stitution and By-Laws of the Confederated Tribes of the Colville Reservation, ratified by the Colville Indians on February 26, 1938, and approved by the Commissioner of Indian Affairs on April 19, 1938.

ATTEST:

Narcisse Nicholson, Jr.

.....

Narcisse Nicholson, Jr., Chairman
Colville Business Council

APPENDIX C

COMPLAINTS

THOMPSON COMPLAINT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON NORHERN DIVISION

ALICE M. THOMPSON, *Plaintiff,* v. MEL TONASKET, CLARENCE DESAUTEL, LUCY COVINGTON, BARBARA MARCHAND, CHARLES QUINTASKET, GABE MOSES, SHIRLEY PALMER, ANDY JOSEPH, BARNEY RICKARD, AL AUBERTIN, ALICE LAWRENCE, ROY SEYLOR, GEORGE MEUSY, JOE KOHLER, as members of the COLVILLE BUSINESS COUNCIL of the Colville Confederated Tribe, and THE COLVILLE CONFEDERATED TRIBE, *Defendants.*	Civil No. 3540 COMPLAINT

Comes now the Plaintiff above named and for cause of action against the Defendants alleges and shows the Court as follows:

I.

That at all times herein mentioned the following were the members of the Colville Business Council of the Colville Confederated Tribe: Mel Tonasket, Clarence Desautel, Lucy Covington, Barbara Marchand, Charles Quintasket, Gabe Moses, Shirley Palmer, Andy Joseph, Barney Rickard, Al Aubertin, Alice Lawrence, Roy Seylor, George Meusy and Joe Kohler.

II.

That at all times herein mentioned the Colville Confederated Tribe was a tribe of Indians, with its holdings and main place of business located within Okanogan and Ferry Counties, State of Washington.

III.

That at all times herein mentioned the Colville Business Council was composed of members of the Colville Confederated Tribes, with their principal place of business in Nespelem, Washington, and Coulee Dam, Washington.

IV.

That at all times herein mentioned, the Plaintiff herein Alice M. Thompson, was also known as Alice Margaret McDonald.

V.

That the Plaintiff was born August 25, 1911, near Oroville, Okanogan County, Washington, and that her place of birth was recorded September 2, 1911, with the Registrar of Births in Olympia, Washington.

VI.

That the Plaintiff is an American citizen by birth, and has always retained her rights as an American citizen and has never in any manner given up such rights.

VII.

That the Plaintiff is married to Louis Raymond Thompson, an American citizen born in Sprague, Washington, who has always retained his rights as an American citizen.

VIII.

That the Plaintiff was enrolled on the Colville Indian rolls on or about November 2, 1911; that the Plaintiff remained on the Colville rolls from the time she was placed thereon, and had an allotment on the Colville Reservation up to the date of approximately 1953; that the Plaintiff received her per capita payments and all payments given to other members of the Colville Tribe up through the year of 1952.

IX.

That on or about the year of 1953, the Plaintiff was improperly stricken from the rolls of the Colville Confederated Tribe and deleted therefrom as a member; that on or about the year of 1958 the Plaintiff received her Patent in Fee to her allotment.

X.

That the alleged reason that the Plaintiff was stricken from the rolls of the Colville Confederated Tribes by an action of the tribal council and/or the Colville Business Council of the Colville Confederated Tribes; that the alleged reason she was stricken from the rolls was based upon the claim that the Plaintiff was a Canadian and not an American citizen; that in truth and fact, this was not so, and the Plaintiff at all times has been an American citizen and was not a Canadian Indian.

That at the time the Plaintiff was improperly stricken from the rolls of the Colville Confederated Tribe, she protested this, but had no control by which to stop her name being deleted from the rolls, and such action was taken, which the Plaintiff alleges was not a proper act in any respect; that the action was taken without the Plaintiff

having full right of representation at the hearing and without her having full right to present her evidence to the council or to the proper authorities.

XI.

That allegedly the reason that Plaintiff was stricken from the rolls was that she had voted in a foreign election in Canada, and by so doing, had lost her American citizenship. They contended they were acting under 8 U.S.C. § 1481(a)(5) and under the ruling of *Perez v. Brownell*, 356 U.S. 44 (1958). 8 U.S.C. § 1481(a)(5) was declared unconstitutional by the case of *Afroyim v. Rusk*, 387 U.S. 253 (1967), and the *Perez v. Brownell* case was overruled by the *Afroyim v. Rusk* case, and by the unconstitutional 8 U.S.C. § 1481(a)(5).

XII.

The *Plaintiff has again petitioned* to the Colville Business Council to be enrolled as a member of the Colville Confederated Tribe, and they and the enrollment committee were advised by the United States Department of the Interior, Bureau of Indian Affairs, in Washington, D.C., that based upon the law that the Council did not have the authority, and the enrollment committee did not have the authority, to determine whether a tribal member would lose their nationality by voting in a foreign election and did not have the authority to declare that the Plaintiff herein had lost her right to remain a member of the Colville Confederated Tribe by declaring that she had voted in a foreign election.

XIII.

That even though the Colville Business Council and the Colville Confederated Tribe and the Enrollment Commit-

mittee were advised of this, *they still have refused to act* upon the application of the Plaintiff herein to be placed back on the rolls of the Colville Confederated Tribe.

XIV.

That the Plaintiff meets all of the requirements for membership in the Colville Confederated Tribe, and is an American citizen, and the Defendants had no right whatsoever to strike her from the rolls.

XV.

That although repeated requests were made for the reenrollment of the Plaintiff, the Tribal Council and the Enrollment Committee *have refused to take any action thereon.*

XVI.

That the actions of the Colville Confederated Tribe, the Business Council and the Enrollment Committee was arbitrary and capricious and illegal and unconstitutional and in violation of the Plaintiff's constitutional rights as an American citizen, as they had declared that she no longer was an American citizen.

XVII.

That many other individuals have been enrolled in the Colville Confederated Tribe, without having to show all of the facts that this plaintiff has had to show, and who had some of the disqualifications that were claimed to exist against the Plaintiff herein; that the said tribal council has discriminated against the Plaintiff, contrary to law, even though she has met all of the requirements to be re-enrolled in the tribe.

That the said acts of discrimination against the Plaintiff are contrary to the laws of the United States, being 42

U.S.C.A. 1981 and all pertinent sections under the Civil Rights Acts under Title 42, and the United States Constitution and all pertinent sections thereof.

That 25 U.S.C.A. ∫ 1302 provides that no Indian tribe in exercising powers of self government shall deny to any person within its jurisdiction the equal protections of the laws, or deprive any person of liberty or property without process of law.

That by the arbitrary, capricious, and discriminatory action of the Business Council of the Colville Confederated Tribe, the Colville Confederated Tribe and the Enrollment Committee, *the Plaintiff has been denied equal protection of the laws and has been deprived of property without due process of law.*

XVIII.

That a Federal question is involved; that the United States District Court has jurisdiction of the persons and subject matter herein.

XIX.

That if the Plaintiff is placed back on the rolls of the Colville Confederated Tribe, *it would mean that she would have an interest in the Colville Confederated Tribe* and would receive benefits from the Colville Confederated Tribe.

That certain benefits have been paid to the members of the Colville Confederated Tribe through per capita and otherwise, for a number of years, and since 1953, and that Plaintiff is entitled to have these benefits paid to her from the date that she was improperly stricken from the rolls of the Colville Confederated Tribe to the date of hearing of this Complaint and the decision of the Court,

as such benefits are earned benefits to which the Plaintiff is entitled, and is being improperly deprived of, without due process of law; that the exact amount of such benefits are unknown to the Plaintiff, but will be alleged and testified to at the time of trial, said benefits being for per capita payments and other payments made to members of the tribe since 1953.

That the Plaintiff should be allowed a reasonable attorney's fee against the Defendants for the bringing of this action, as the Defendants have, without proper authority, discriminated against the Plaintiff, and without proper authority have stricken the Plaintiff from the tribe's rolls, and that a reasonable attorney's fee would be the sum of $5,000.00.

That the Plaintiff has no other adequate remedy at law.

That the Defendants now refuse to act upon Plaintiff's petition, even though they have been instructed as to what the law is and what the rights of the Plaintiff are, and by so doing, the said Defendants are continuing to deprive the Plaintiff of her property without due process of law

WHEREFORE, the Plaintiff prays for Judgment against the Defendants as follows:

1. That the Court decree that the Plaintiff be reinstated and re-enrolled as a member of the Colville Confederated Tribe, and that her name be placed retroactively upon the rolls, effective as of the date of 1952, and that the Court order and decree that the Colville Business Council and the Colville Confederated Tribe and the Enrollment Committee enact the necessary Resolution to approve the application of the Plaintiff for the placing of her name back upon the rolls of the Colville Confederated Tribe, and

that her name be placed thereon retroactively as of the year 1952.

2. That the Court order and direct that said Plaintiff receive full back per capita payments, and any and all other payments that have been made to members of the Colville Confederated Tribe, since the year of 1952 to the date of Judgment of this Court and that the Colville Confederated Tribe and the Colville Business Council be ordered to adopt the necessary resolution for the payment of said amounts, and if such cannot be done, then, in the alternative, that the Plaintiff have judgment against the Colville Confederated Tribe and the Colville Business Council and the Enrollment Committee of the Colville Confederated Tribe, and the specific members of the Colville Confederated Tribe, for the amount of said back per capita pay and any and all other payments made to the members of the Colville Confederated Tribe since the year 1952, plus interest on said amount at the rate of eight (8%) per cent per annum from the time said amounts became due and payable to the date of Judgment.

3. That the Court decree that the Plaintiff have judgment against the Defendants for attorney fees in the sum of $5,000.00, plus Plaintiff's court costs herein.

4. For such other and further relief as to the Court may seem just, equitable and proper.

s/ KELLY HANCOCK
Attorney for Plaintiff
Box H, Omak,
Washington 98841

STATE OF WASHINGTON }
County of Okanogan } ss.

ALICE M. THOMPSON, being first duly sworn, on oath, deposes and says: That she is the Plaintiff named in the

above entitled action; that she has read the foregoing Complaint, knows the contents thereof and believes the same to be true.

s/ ALICE M. THOMPSON

Subscribed and sworn to before me this 9th day of August, 1971. [seal]

s/ KELLY HANCOCK
Notary Public in and for the State of Washington, residing at Omak.

LARAMIE COMPLAINT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

JUNE KAREN LARAMIE, PATRICIA MAE LARAMIE and CONNIE SUE LARAMIE, by and through their Guardians Ad Litem, EVELYN A. LARAMIE, and TYRONE W. LARAMIE,

Plaintiffs,

v.

NARCISSE NICHOLSON, JR., MARY NICHOLSON, THELMA MARCHAND, GEORGE SNIDER, ALICE LAWRENCE, ROY SEYLOR, DEAN DOURGEAU, PAT NUGENT, BARNEY RICKARD, OLIVER POOLER, SHIRLEY PALMER, JIMMY ORR, LUCY COVINGTON, and VIRGINIA ANDREWS, as members of the COLVILLE BUSINESS COUNCIL of THE COLVILLE CONFEDERATED TRIBE, and THE COLVILLE CONFEDERATED TRIBE,

Defendants.

COMPLAINT
No. 3402

Come now the Plaintiffs above named and by and through their Guardians Ad Litem alleges and show the Court as follows:

I.

That Tyrone W. Laramie and Evelyn A. Laramie are the duly appointed, qualified and acting Guardians Ad Litem of June Karen Laramie, Patricia May (sic) Laramie and Connie Sue Laramie, the above named minors.

II.

That at all times herein mentioned the Defendants Narcisse Nicholson, Jr., Mary Nicholson, Thelma Marchand, George Snider, Alice Lawrence, Roy Seylor, Dean Dougeau, Pat Nugent, Barney Rickard, Oliver Pooler, Shirley Palmer, Lucy Covington, Jimmy Orr and Virginia Andrews were members of the Colville Business Council of the Colville Confederated Tribes.

That at all times herein mentioned the Colville Business Council, acting on behalf of the Colville Confederated Tribes, acted on the application of the three minor Plaintiffs for tribal membership.

That at all times herein mentioned the Colville Business Council was composed of members of the Colville Confederated Tribes, with their principal place of business at Nespelem, Washington, and Grand Coulee, Washington.

III.

That the said three minor Plaintiffs did apply to the Colville Business Council to be adopted as members of the Colville Confederated Tribes.

IV.

That the said Colville Business Council and/or the Enrollment Committee thereof advised the parents of said minors that there were certain requirements that they had to meet and certain evidence that they had to show,

to wit: That they were citizens of the United States, that they had the proper degree of Indian blood to be admitted to the Colville Confederated Tribe, that they were not members of any other tribe, and other requirements alleged to be required by the Colville Confederated Tribes for enrollment, which requirements had been set up by the Business Council of the Colville Confederated Tribes.

That all of said requirements were met by the Plaintiffs.

That at the time of the last hearing, the Enrollment Committee contended that a Resolution had been passed by the Colville Business Council that prohibited the minors from being adopted as members of the Colville Confederated Tribe, due to the fact that they and/or their parents had been enrolled in a Canadian tribe, even though they had been disenfranchised therefrom, disbarred them from becoming adopted. It was stipulated by the Business Council, however, that if this did not bar them, then their application for enrollment would be accepted.

It was stipulated at the hearing that an opinion would be requested by the Enrollment Committee and/or the Colville Business Council from the Department of the Interior, Bureau of Indian Affairs, Washington, D.C., and that an opinion would be requested by the attorney representing the said Plaintiffs.

That the said opinion was requested both by the Colville Confederated Tribes through their respective business council, and by the attorney for the Plaintiffs. That it was ruled by the Bureau of Indian Affairs of the Department of Interior, through the Commissioner of Indian Affairs that the fact that said Plaintiffs and/or their parents, had

been enrolled before in a tribe in Canada did not, under the resolution, disqualify them, since they had been disenfranchised from that tribe. However, even though such ruling was made, the said Colville Business Council and the Colville Enrollment Committee then refused to grant any further hearing on said adoption petitions by the Plaintiffs, and refused to take any further action to adopt said Plaintiffs into the membership of the Colville Confederated Tribes.

V.

That the said actions of the Colville Confederated Tribe by and through the Colville Business Council, and by and through the Enrollment Committee of the Colville Business Council was an action on behalf of said tribe and governing bodies thereof, and that said tenants (sic, defendants) *discriminated against the said three minor Plaintiffs*, herein, even though said Plaintiffs met all of the requirements required of them, even though two of the Plaintiffs went to the extent of securing the necessary papers to show that they were United States citizens, and that the said Colville Confederated Tribe, acting through their respective defendant governing body, improperly, without authority, *did discriminate against the said Plaintiffs* contrary to the laws of the United States, being USCA "Sections 1981 and all pertinent sections under the Civil Rights Act under Title 42, and the United States Constitution and all pertinent sections thereto."

That many other individuals have been adopted into the Colville Confederated Tribe without having to show all of the facts that these Plaintiffs have had to show, and that many individuals have been adopted who had some of the

disqualifications that these Plaintiffs had to show did not exist, and that the said tribal council has *discriminated against these Plaintiffs contrary to law,* because they required more of them than other individuals who have been adopted into the Tribe, and that they have been *further discriminated against* because even after these requirements had been met, the applications of Plaintiffs were still refused.

VI.

That a Federal question is involved. That the U. S. District Court has jurisdiction of said matter.

That being adopted as members of the Colville Confederated Tribes by said respective Plaintiffs would mean that they would have an interest in the assets of the Colville Confederated Tribes, and that they would receive benefits from the Colville Confederated Tribe in the future.

That certain benefits have been paid to the members of the Colville Confederated Tribe, through per capita and otherwise, for a number of years, and that the Plaintiffs are entitled to have these benefits paid to them from the date of their application was made to the date of the hearing on this Complaint, as such benefits are earned benefits which Plaintiffs are entitled to; that the exact amount of such benefits are unknown to the Plaintiffs, but will be alleged and testified to at the time of trial.

VII.

That said Plaintiffs should be allowed a reasonable attorney's fee against the Defendants for the bringing of this action; that a reasonable attorney's fee would be $2,500.00, plus Court costs herein.

VIII.

That the Plaintiffs have no other adequate remedy at law.

WHEREFORE, Plaintiffs pray for Judgment as follows:

1. That the Court decree that the Defendants have improperly acted upon the applications for adoptions on behalf of said minor Plaintiffs, and decree and order that the Colville Business Council of the Colville Confederated Tribe pass the necessary resolution to approve the applications for the petition for adoption by said three minor Plaintiffs, and that the said Plaintiffs be adopted as members of the Colville Confederated Tribe and placed on the rolls thereof effective as of the dates of their applications.

2. That the Court order that said three minor Plaintiffs receive full back per capita payments that have been made during the time interval since they made application to the date of this decree.

3. That the Court decree that Plaintiffs have judgment against the Defendants for attorney fees in the sum of $2,500.00, plus the Plaintiffs' Court costs herein.

4. That the Court decree and award such other and further relief as to the Court seems just and proper.

HANCOCK & KOHLS,
Box H, Omak, Washington
98841
s/KELLY HANCOCK
Attorneys for Plaintiffs

State of Washington }
County of Stevens } ss.

TYRONE W. LARAMIE and EVELYN A. LARAMIE, husband and wife, being first duly sworn, on oath, deposes and says: That she is the Plaintiff above named and on the duly appointed, qualified and acting Guardian Ad Litem of June Karen Laramie, Patricia Mae Laramie and Connie Sue Laramie, Minors; that she has read the foregoing Complaint, knows the contents thereof and believes the same to be true.

s/ TYRONE W. LARAMIE
s/ EVELYN A. LARAMIE

Subscribed and sworn to before me this 26th day of June, 1970.

s/ [SIGNATURE]
Notary Public in and for the State of Washington, residing at Colville, Wash.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1281

MEL TONASKET, *et al.*,
Petitioners,

v.

ALICE M. THOMPSON,
Respondent.

NARCISSE NICHOLSON, JR., *et al.*,
Petitioners,

v.

JUNE KAREN LARAMIE, *et al.*,
Respondents.

MOTION OF THE HOOPA VALLEY TRIBE OF INDIANS, FOR LEAVE TO FILE STATEMENT AMICUS CURIAE IN SUPPORT OF PETITION OF MEL TONASKET, et al., and NARCISSE NICHOLSON, JR., et al., FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Hoopa Valley Tribe of Indians respectfully moves for leave to file, as amicus curiae, the accompanying statement in support of the petition of Mel Tonasket, et al., and Narcisse Nicholson, Jr., et al., (No. 73-1281, filed February 20, 1974), for writs of certiorari to the United States Court of Appeals for the Ninth Circuit.

The Hoopa Valley Tribe states, in support of this motion, that the decisions of the United States Court of Appeals for the Ninth Circuit in *Thompson* v. *Tonasket*, 487 F.2d 316 (9th Cir. 1973) and *Laramie* v. *Nicholson*, 487 F.2d 315 (9th Cir. 1973) are erroneous in holding that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-3 vests federal courts with jurisdiction to determine questions of tribal membership. The holdings are contrary to the spirit and intent of the Indian Civil Rights Act of 1968, and would destroy the entire sovereign right of the Indian tribes to determine their own membership.

In the interest of justice, the Hoopa Valley Tribe of Indians respectfully requests that the Court grant this motion.

STATEMENT OF THE HOOPA VALLEY TRIBE OF INDIANS IN SUPPORT OF PETITION OF MEL TONASKET, et al., and NARCISSE NICHOLSON, JR., et al., FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I.

STATEMENT OF INTEREST

The Hoopa Valley Tribe of Indians resides on the Hoopa Valley Reservation, California, pursuant to the "Treaty of peace and friendship between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians," executed in 1864, and the Executive Order of June 23, 1876, (1 Kapp. 815).

The Hoopa Valley Tribe is organized under a Constitution and By-Laws, duly approved by the Secretary of the Interior. Article IV of the Tribal Constitution prescribes rules and regulations governing future membership in the Hoopa Valley Tribe, subject to the approval of the Secretary of the Interior.

The power of the Tribe to determine enrollment upon the Hoopa Valley Reservation with the approval of the Secretary of the Interior has been challenged in *Short* v. *United States*, 486 F.2d 561 (Ct. Cl. 1973). Your amicus petitioned this Court for a writ of certiorari (*Hoopa Valley Tribe* v. *Short*, No. 73-1104) to review the aforementioned decision of the Court of Claims on January 14, 1974.

The decisions of the United States Court of Appeals for the Ninth Circuit in *Thompson* v. *Tonasket*, 487 F.2d 316 (9th Cir., 1973) and *Laramie* v. *Nicholson*, 487 F.2d 315 (9th Cir., 1973) bear directly upon the resolution of questions of tribal membership which are presented in *Short* v. *United States*, *supra*.

II.

FEDERAL COURTS HAVE NO SUBJECT MATTER JURISDICTION OVER INDIAN TRIBAL MEMBERSHIP QUESTIONS

In *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), this Court held that termination of tribal membership is a political matter "not subject to be controlled by the judicial department of the government" [187 U.S. at 565]. But in sharp contrast, Congress has plenary power to regulate tribal enrollment. *Powers of Indian Tribes*, 55 I.D. 14, 33 (1934).

Consistent with its plenary authority, Congress has enacted 25 U.S.C. § 163 which delegates to the Secretary

of the Interior general authority to approve final tribal rolls for purposes of dividing and distributing tribal funds. With respect to the Colville Confederated Tribes, Congress has gone even further through 25 U.S.C. § 1071 which limits per capita payments by the Tribes "to each enrolled member of the Confederated Tribes of the Colville Reservation."

Determination of the tribal roll itself has been left to the Colville Confederated Tribes through Section 2 of Amendment III of the Tribal Constitution, but federal sanction of the tribal roll occurs through re-delegation of the Secretary's supervisory power down to the level of Superintendent of the Colville Indian Agency.

This Secretarial authority to approve tribal rolls does not give the Secretary the power to place onto the membership roll persons who have been denied membership by the tribe under provisions of the tribal constitution:

> Whatever may be the exact extent of departmental power in this field, in view of the broad provisions of the Wheeler-Howard Act it has been administratively held that the Secretary of the Interior may define and confine his power of supervision in accordance with the terms of a constitution adopted by the tribe itself and approved by him. [U. S. Department of Interior, *Federal Indian Law*, 421 (1958)]

Thus the Secretary is empowered to review the roll to assure that a tribe has followed its own constitutional procedures in placing someone on its membership lists but cannot act on his own to force the tribe to accept a new member.

This restriction on review of tribal roll determinations is supported by an Opinion of the Solicitor of the Department of Interior, December 18, 1937:

> . . . while the Department may approve or disapprove adoptions into the tribe and expulsion therefrom made by the tribal authorities, no case holds that the Department, in the absence of express statutory authorization, may grant a person tribal membership over the protest of the tribal authorities.

The underlying concept of the Indian Reorganization Act of 1934 was that tribes should be able to carry out the functions of a government and to utilize fully their sovereign powers. The approval of tribal constitutions and ordinances by the Secretary of the Interior provides any governmental supervision that might be necessary in carrying out these functions. Inserting the court as supervisor over tribal enrollment functions is a usurpation of legislative and tribal power that is of potentially enormous significance to the administration of Indian affairs.

The legislative history of the Indian Civil Rights Act of 1968 reflects a change from an approach of imposing on Indian tribes the full Constitutional limitations applicable to the federal and state governments to an approach of extending certain specified protections on a limited basis to persons who become subject to tribal governmental action. As stated in Burnett, *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 Harv. J. Legis. 557, 617 (1972):

> For the federal courts, the practical meaning of this accommodation is that title II requires a limited construction which takes an informed account of its development. It does not authorize the court to apply broadly such elusive and expanding concepts as due process, equal protection, or unreasonable search and seizure without a sensitive regard for their impact on tribal structures and values. Because this point is fully revealed only by tracing seven years of legislative history, there is a danger that it may be missed and that an unlimited construction of title

II will exacerbate the tribes' difficulties adjusting to its requirements.

III.

CONCLUSION

The question of whether a federal court has jurisdiction over determinations of tribal membership made by the tribe in the exercise of its internal sovereign rights is one of great importance for intertribal and intratribal relations, and is therefore appropriate for Supreme Court review.

The Hoopa Valley Tribe of Indians respectfully requests that the petition of Mel Tonasket, et al. and Narcisse Nicholson, Jr., et al. for writs of certiorari to the United States Court of Appeals for the Ninth Circuit be granted, and that the Court of Appeal's decisions in *Thompson* v. *Tonasket*, 487 F.2d 316 (9th Cir. 1973), and *Laramie* v. *Nicholson*, 487 F.2d 315 (9th Cir. 1973), be reversed.

Respectfully submitted,

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BARKER
ALAN I. RUBINSTEIN
Of Counsel

April, 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1281

MEL TONASKET, ET AL., PETITIONERS

v.

ALICE M. THOMPSON

NARCISSE NICHOLSON, JR., ET AL., PETITIONERS

v.

JUNE KAREN LARAMIE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to this Court's order of April 22, 1974, inviting the Solicitor General to express the views of the United States with respect to the pending petition for certiorari.

QUESTIONS PRESENTED

1. Whether the federal courts have jurisdiction under 28 U.S.C. 1343(4) to review violations of the Indian Civil Rights Act (25 U.S.C. 1301-1303) which are not reviewable by writ of habeas corpus.

2. Whether Congress, in enacting the Indian Civil Rights Act, waived the immunity from suit of Indian Tribes, and if so, whether that waiver extends to money judgments against the Tribes.

3. Whether tribal officers acting within the scope of their duties enjoy either absolute or qualified immunity from suit.

STATEMENT

The petition joins two cases which were decided by the court of appeals within a month of each other and which raise the same jurisdictional issues.

1. *Tonasket* v. *Thompson*

Mrs. Thompson's complaint (Pet. App. C, A11-A17), filed in the federal district court for the Eastern District of Washington against the Colville Confederated Tribe and 14 members of the Colville Business Council (the Tribal Council) "as members of the Colville Business Council," alleges that she was born in 1911 in the State of Washington and was enrolled as a member of the Colville Indian Tribe. Until 1953 she received per capita payments from the Tribe. In that year, according to the complaint, her name was improperly striken from the rolls of the Tribe on the ground that she had lost her American citizenship and had become a Canadian citizen. Mrs. Thompson alleges that this action was taken by the petitioners without giving her adequate procedural safeguards and was in error under *Afroyim* v. *Rusk*, 387 U.S. 253, since she had not lost her American citizenship by voting in a Canadian election. She further alleges that she applied for new enrollment in the Tribe but was turned down, in violation of 25 U.S.C. 1302(8), prohibiting an Indian Tribe from denying any person equal protection of its laws.

Mrs. Thompson prays that the court:

> (a) order the Tribe to pass an appropriate resolution to restore her to membership retroactively; and
>
> (b) render judgment in her favor against the Tribe and the named members of its enrollment committee for per capita payments she would have received since her disenrollment, together with 8 percent interest per annum, $5,000 attorney's fees, and costs.

The petitioners, by affidavits attached to a motion for summary judgment, stated that Mrs. Thompson had been removed from membership after notice and a hearing because she had resided in Canada for twenty years and under the Tribal Constitution had thereby abandoned her membership, regardless of questions of citizenship, and that re-enrollment, *i.e.*, adoption, is at the discretion of the Tribe.[1] Petitioners also moved to dismiss the complaint on the grounds that the federal court lacked jurisdiction over the defendants and the subject matter and that the complaint failed to state a claim upon which relief could be granted (Pet. 6-7).

The district court dismissed the complaint for lack of subject matter jurisdiction (Pet. 7; Br. in Opp. 4). The court of appeals reversed and remanded, *per curiam*, with references to its decisions in *Laramie* v. *Nicholson* and *Johnson* v. *Lower Elwha Tribal Community*, 484 F. 2d 200 (Pet. App. A).

2. *Nicholson* v. *Laramie*

In this case as in *Thompson* the complaint (Pet. App. C, A18-A22) filed in federal district court for the Eastern District of Washington is against the Colville Confederated

---

[1]See Pet. 4-7. We are lodging with the Clerk copies of petitioners' motions for summary judgment in *Thompson* and *Laramie*, together with the affidavits in support of the motions and the counter affidavits of Alice Thompson and Evelyn Laramie.

Tribe and named members of its Business Council, as members of the council. It alleges that the complainants, minors whose parents had been members of a Canadian tribe, were arbitrarily denied enrollment in the Colville Tribe after their membership in the Canadian tribe had been terminated. The plaintiffs pray for enrollment, back payments, costs and attorney's fees. The petitioners filed a motion for summary judgment stating that enrollment of persons who have been members of other tribes would be contrary to a tribal resolution approved by the Secretary of the Interior. The petitioners also moved to dismiss the complaint for lack of jurisdiction and failure to state a claim on which relief could be granted. The district court dismissed the complaint for lack of subject matter jurisdiction (Pet. App. A, A2). The court of appeals, in a two-page opinion (Pet. App. A, A2-A3), reversed and remanded. It held that the district court has jurisdiction over the case under 28 U.S.C. 1343(4) and cited with approval its decision in *Johnson* v. *Lower Elwha Tribal Community,* 484 F. 2d 200, which had held (*id.* at 203) that the Indian Civil Rights Act (25 U.S.C. 1301-1303) waives tribal immunity from suit.

DISCUSSION

1. Indian tribes are treated in the United States Constitution *in pari materiae* with states and foreign nations, Art. I, Sec. 8, cl. 3. This Court, while recognizing Congress' plenary authority over Indian tribes and trust responsibility toward them, has also recognized their residual sovereignty as governmental entities—a sovereignty predating the Constitution. *Worcester* v. *Georgia,* 6 Pet. 515; *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164. Indian tribes are therefore immune from suit unless Congress waives their immunity. *United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512. This immunity is perhaps more important for a tribe

than for a state or the federal government because of the very limited financial resources of most tribes—which affect both their ability to hire lawyers to defend suits and their ability to pay judgments. Accordingly, a waiver of the immunity of an Indian tribe must be in "plain and unambiguous terms," *Thebo* v. *Choctaw Tribe of Indiana*, 66 Fed. 372, 376 (C.A.8), as must any statute taking away tribal rights. See, *e.g., Menominee Tribe* v. *United States*, 391 U.S. 404; *Squire* v. *Capoeman*, 351 U.S. 1-7.

Because Indian tribes are neither the United States nor states, the requirements of the Bill of Rights have been held inapplicable to their actions in regard to their members. *Talton* v. *Mayes*, 163 U.S. 376; *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (C.A. 10); see also *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (C.A. 8). But see *Colliflower* v. *Garland*, 342 F. 2d 369 (C.A. 9). In response to what was seen as a lack of constitutional safeguards for individual Indians vis-a-vis their tribes, Congress, in 1968, enacted the Indian Civil Rights Act (Pub. L. 90-284, 82 Stat. 73, Title II of the Civil Rights Act of 1968; now codified as 25 U.S.C. 1301-1303). That Act enumerates certain specific rights, many, but not all, in the area of criminal procedure, which are not to be abridged by tribal governments. Among the enumerated rights is the following:

No Indian tribe in exercising powers of self-government shall

* * * * *

> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law [25 U.S.C. 1302].

The only jurisdictional provision in the Act is 25 U.S.C. 1303 which provides:

> The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

The Act contains no specific provision for enforcement of rights that might be infringed without detention, nor does it contain any provision explicitly waiving tribal immunity from suit. This has left to the courts the duty of interpreting the Act in such a way as to make it effective, while still protecting Indian self-government. Both of these objectives are within the congressional intent. See Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act,* 9 Harvard Journal on Legislation 557 (1972).

2. In our view, the Court should grant the petition for certiorari in this case.

We agree with the court of appeals that federal review of violations of the Indian Civil Rights Act is not limited to writs of habeas corpus. Under 28 U.S.C. 1343(4) federal district courts have jurisdiction to hear cases commenced by any person "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." In *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, this Court invoked 28 U.S.C. 1343(4) as a jurisdictional basis for enforcing the rights secured by 42 U.S.C. 1982. In our view, that same Section similarly provides a proper jurisdictional base to protect the rights, in addition to those redressable by writ of habeas corpus, secured by the Indian Bill of Rights. Compare *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388.

But neither Section 1343(4) nor the Indian Civil Rights Act purports to waive the immunity of Indian Tribes from suit. That immunity therefore remains and

protects the Tribes much as the Eleventh Amendment protects the states or the principle of sovereign immunity protects the United States. See *United States* v. *United States Fidelity & Guaranty Co., supra.* Moreover, for the same reasons that state and federal officers must have some personal immunity from suit in order to perform their duties without fear or harassment, tribal officers must be protected while acting within the scope of their duties. Compare *Barr* v. *Matteo,* 360 U.S. 564.

The causes of action at issue here may be analytically divided into two separate claims, each of which has two parts:

(1) the suits against the tribal officers

(a) for injunctive relief,
(b) for damages;

(2) the suits against the Tribe itself

(a) for injunctive relief,
(b) for damages.

The court of appeals, in remanding these case *in toto* and with reference to its opinion in *Lower Elwha, supra,* permits suit against the Tribe itself and apparently, so far as jurisdiction is concerned, would permit a money judgment against the Tribe. And nothing in its opinions would preclude a money judgment against tribal officers, without reference to any immunity of governmental officials. All of this, in our view, gives too little effect to the intent of Congress to protect tribal sovereignty and self-government as well as the rights of tribal members.

By analogy to *Ex Parte Young,* 209 U.S. 123, the district court had jurisdiction under 28 U.S.C. 1343(4) to entertain the suits for injunctive relief against the tribal officers. By analogy to *Scheuer* v. *Rhodes* and *Krause* v. *Rhodes,* Nos. 72-914 and 72-1318, decided April 17, 1974, in some circumstances, the court would also have jurisdiction to

entertain suits for monetary damages against tribal officers. But to the extent that the court of appeals' decisions sanction a claim for monetary damages against the Tribe itself, they are, in our view, inconsistent with *United States* v. *United States Fidelity & Guaranty Co., supra,* and, by analogy, with this Court's recent decision in *Edelman* v. *Jordan,* No. 72-1410, decided March 25, 1974. In the fourth situation—suits for injunctive relief against a Tribe—normal application of immunity rules would prohibit suit against the Tribe itself. See *United States* v. *United States Fidelity & Guaranty Co., supra; Edelman* v. *Jordan, supra.*

Thus, in our view, the district court properly dismissed the suits against the Tribe itself and the court of appeals erred in remanding those claims, and in suggesting that the Indian Civil Rights Act waives the immunity of the Tribe and its officers.

3. The decisions below add to the generally confused state of the law concerning the proper role of federal courts in enforcing the Indian Civil Rights Act. The Ninth Circuit has now in three cases (the instant cases and *Lower Elwha, supra)* held or suggested that since the enactment of the Indian Civil Rights Act neither Tribes nor their officers are immune from money judgments and that federal courts have broad jurisdiction to review tribal decisions. The Tenth Circuit, to the contrary, has taken a more restrictive, perhaps conflicting, view. In *Slattery* v. *Arapahoe Tribal Council,* 453 F. 2d 278, a case almost identical to *Nicholson* v. *Laramie,* that court affirmed the district court's dismissal of a suit brought by the mother of minor children alleging that the Tribe had arbitrarily refused their application for adoption. The court of appeals held that on the basis of the complaint, motion to dismiss, and affidavits in support of the motion, the facts alleged "are insufficient to bring into play

the Indian Bill of Rights, the rule of *Martinez* [*Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915 (C.A. 10), holding that federal courts do not have jurisdiction over intratribal controversies] controls and the trial court was correct in its determination that it did not have jurisdiction." *Id.* at 282. See also the court's similar conclusion in *Groundhog* v. *Keeler*, 442 F. 2d 674 (C.A. 10).

The court of appeals for the Eighth Circuit has taken an intermediate position. In two cases seeking injunctive relief in connection with tribal elections, brought against the Tribes as such as well as other defendants, it found jurisdiction over the Tribe and tribal officers under 28 U.S.C. 1343(4). *Luxon* v. *Rosebud Sioux Tribe*, 455 F. 2d 698; *Daly* v. *United States*, 483 F. 2d 700. But neither case involved a claim for a money judgment. See also *Brown* v. *United States*, 486 F. 2d 658 (C.A. 8). In *Luxon*, *supra*, the court, contrary to the Tenth Circuit's decision in *Slattery*, *supra*, distinguished between its finding of jurisdiction and the separate question whether the complaint states a cause of action on which relief can be granted. On the latter question, but not the former, it remanded the case to the district court.

Thus, six years after the enactment of the Indian Civil Rights Act, and after considerable litigation, the jurisdiction of the federal courts to enforce the Act and the immunities of Tribes and tribal officers remains unclear. Tribes and tribal members need to know with more certainty the kinds of relief that federal courts can grant under the Act, and Tribes and tribal officers need to be protected from excessive assumptions of jurisdiction, contrary to principles of tribal sovereignty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

AUGUST 1974.

DOJ-1974-08